Office - Supreme Court, U. S.
FILED
AUG 14 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 260

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

—against—

MORRIS S. KITZEN,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

MORRIS S. KITZEN
Petitioner in Person
120 Bristol Street
Brooklyn 12, New York

INDEX

	PAGE
PETITION	1
Summary Statement of Matter Involved	1
Material Facts	3
The Basis of This Court's Jurisdiction	5
Questions Presented	27
Relevant Constitutional and Statutory Provisions	28
Reasons for Allowance of the Writ	29
Prayer	58
BRIEF IN SUPPORT OF PETITION	59
Statement of the Case	59
Opinions Delivered Below	59
Grounds for Jurisdiction	60
Constitutional and Statutory Provisions Involved	63
Specification of Errors to Be Urged	63
Preliminary Statement	65
ARGUMENT	66

PAGE

POINT I:

The duty of maintaining constitutional rights of a person on trial for his life, liberty, or property rises above mere rules of court procedure, mere rules of judicial procedure, whether they are the product of judicial decision or of legislative enactment. The due process clauses apply to all rules of judicial procedure, irrespective of the fact whether they are the product of judicial decision or of legislative enactment. Where there is a conflict between the essential elements of due process of law and a rule of judicial procedure, a rule of state practice, the essential elements must prevail over the rule of court procedure, the rule of judicial procedure must give way to the due process clauses of the Fourteenth Amendment—the supreme law of the land 66

POINT II:

Judicial power could not be delegated to the prosecuting officers who acted on behalf of the state, and the prosecuting officers or the district attorney could not substitute his own personal judgment for the personal judgment of the trial court. Due process is not satisfied where a prosecuting officer acts both as judge and as prosecuting officer at the very same time 72

POINT III:

Laws which operate arbitrarily or unequally are inconsistent with the essential elements of due process of law or the equal protection clause of the Fourteenth Amendment to the United States Constitution. The equal protection clause of that amendment prohibits the states from making unreasonable classifications in establishing their rules of criminal procedure 77

PAGE

POINT IV:

A conviction which was obtained or procured through a violation of a constitutional right to due process of law, a conviction which was left to conjecture, was repugnant to the essential elements of due process of law and was inconsistent with the essential elements of due process of law within the meaning and interpretation of the due process clauses of the Fourteenth Amendment to the Federal Constitution and the conviction thus obtained and the sentence thus pronounced were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner 85

CONCLUSION 86

Appendix 87

TABLE OF CASES

Aigler, Ralph W., Legislation in Vague or General Terms, 21 Michigan Law Review, 831, 1923 .....37, 39

Alaska Packers Association v. Industrial Accident Commission of California, 1935, 294 U. S. 532 43

Allen v. Arguimbau, 198 U. S. 149 7

Allgeyer v. Louisiana, 165 U. S. 578 49

American Banana Co. v. United Fruit Co., 1909, 213 U. S. 347, 29 S. Ct. 511, 53 L. Ed. 826 35

Atlantic Coast Line R. Co. v. Ford, 1933, 287 U. S. 502, 53 S. Ct. 249, 77 L. Ed. 457 42

Bailey v. Alabama, 1911, 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191 42

Baker v. Baker, Eccles & Co., 1917, 242 U. S. 394, 37 S. Ct. 152, 61 L. Ed. 386 34

PAGE

Barbier v. Connolly, 113 U. S. 27, 31, 136 U. S. 436 .....36, 83
Bowen v. State, 28 Tex. App. 498, 13 S.W. 787 54
Brosman, The Statutory Presumption, 1930, 5 Tulane Law Review 17 42
Brown et al. v. State of Mississippi, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682 .....9, 10, 33, 44, 45, 47, 50, 66, 85

Campbell v. Reg., 1 Cox, Cr. Cas. 269 54
Carter v. State, 20 Wis. 647 54
Chamberlain, Joseph P., "Presumptions as First Aid to the District Attorney," 14 A. B. A. J. 287, 1928 43
Chicago, B. & Q. R. R. Co. v. Chicago, 1897, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 .....14, 38
Civil Rights Cases, 109 U. S. 3 55
Code of Criminal Procedure, Section 437 44
Colgate v. Harvey, 1935, 296 U. S. 404 80
Collins v. Kentucky, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510 40
Com. v. Lowery, 149 Mass. 67, 20 N. E. 697 54
Connally v. General Construction Co., 1926, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322 .....20, 21, 36, 38, 40

Day v. People, 76 Ill. 380 54
De Saussure v. Gaillard, 127 U. S. 216 8
Devine v. Brunswick-Balke-Collender Co., 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B 887 .....52, 74

Ferry v. Ramsey, 1928, 277 U. S. 88, 48 S. Ct. 443, 72 L. Ed. 796 42
Fisher v. State, 145 Miss. 116, 134, 110 So. 361, 365 68
Foster v. State, 88 Ala. 182, 7 South. 185 54
Frank v. Mangum, 237 U. S. 309 .....10, 52, 77
Freel v. State, 21 Ark. 212 54

PAGE

Giozza v. Tiernan, 1893, 148 U. S. 657, 13 S. Ct. 721, 37 L. Ed. 599 ..... 10, 35, 77
Gipson v. State, 38 Miss. 295 ..... 54, 55
Goetz v. Black, 256 Mich. 564, 240 N. W. 94, 84 A. L. R. 802 ..... 52, 74
Gorin v. United States, 312 U. S. 19, 61 S. Ct. 429, 1941, 29 Calif. L. Rev. 548, 1941 39
Guenther v. People, 24 N. Y. 100 54

Hammond v. Whittredge, 204 U. S. 548 7
Harris v. People, 64 N. Y. 148 54
Hawk (Ex Parte), 1944, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572 22
Hebert v. Louisiana, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 1102 67
Heiner v. Donnan, 1932, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772 42
Herndon v. Lowry, 1937, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 ..... 21, 37, 46
Hogan (Matter of) v. Court of General Sessions, 1946, 296 N. Y. 1, 6 ..... 17, 19
Hoxie v. New York, N. H. & H. R. Co., 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324 ..... 52, 74
Hurtado v. California, 1884, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232 66

Illinois v. White, 334 Ill. 465, 166 N. E. 100, 64 A. L. R. 1006 ..... 52, 74
International Harvester Co. v. Kentucky, 1914, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284 ..... 20, 36

James River Nat. Bank v. Haas, —— N D. ——, 15 N. W. (2d) 442, 154 A. L. R. 1005 ..... 52, 74
Johnson v. Risk, 137 U. S. 300 8

Kemmler, In re, 136 U. S. 436 36
Kentucky v. Powers, 201 U. S. 1 7

PAGE

Lanzetta v. State of New Jersey, 1939, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888 ..... 20, 21, 37, 46
Londoner v. Denver, 1908, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 ..... 35, 39
Louisville & Nashville Ry. v. Schmidt, 1900, 177 U. S. 230, 20 S. Ct. 620, 44 L. Ed. 747 35
Lyons (Matter of) v. Goldstein, 1943, 290 N. Y. 19 ..... 17, 18, 19, 57, 80, 81

Manley v. Georgia, 1929, 279 U. S. 1, 49 S. Ct. 215, 73 L. Ed. 575 ..... 41, 43
Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97 ..... 51, 73
Mayflower Farms v. Ten Eyck, 297 U. S. 266 84
McDonald v. Mabee, 1917, 243 U. S. 90, 37 S. Ct. 343, 61 L. Ed. 608 35
McKane v. Durston, 153 U. S. 684 ..... 10, 52, 77
Metropolitan Insurance Co. v. Brownell, 1935, 294 U. S. 580 80
Meyer v. Nebraska, 262 U. S. 390 49
Mooney v. Holohan, 294 U. S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A. L. R. 406 ..... 62, 67, 72
Moore v. Dempsey, 1923, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543 67
Morgan, Edmund M., "Federal Constitutional Limitations Upon Presumptions Created by State Legislation," Harvard Legal Essays, 1934, p. 323 42
Morhous (Matter of) v. N. Y. Supreme Court, 1944, 293 N. Y. 131 17
Morrison v. California, 1934, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664 42
Muskrat v. United States, 219 U. S. 346, 55 L. Ed. 246 ..... 52, 74

Nabors v. State, 6 Ala. 200 54
N. J. S. A. 2:136-4 ..... 37, 46
Newman v. People, 23 Colo. 300, 47 Pac. 278 ..... 54, 55

PAGE

Page v. Com., 9 Leigh (Va.) 683 ..... 54, 55
People v. Cohen, 1911, 148 App. Div. 205 ..... 52, 72
People v. Cummins, 1912, 153 App. Div. 93, 138 N. Y. S. 517, 28 N. Y. Cr. R. 380, affirmed, 1913, 209 N. Y. 283, 103 N. E. 169, 30 N. Y. Cr. R. 330 6
People v. Dunn, 1882, 90 N. Y. 104, reversing Dunn v. People, 27 Hun 272 ..... 6, 7
People v. Gersewitz, 294 N. Y. 163, 1945 19
People v. Langan, 1952, 303 N. Y. 474 ..... 18, 57, 80, 81
People v. Richetti, 1951, 302 N. Y. 290 ..... 18, 57, 80, 81
People v. Louis Sciascia, 1944, 268 App. Div. 14 ..... 6, 7
People v. Louis Sciascia, 1945, 294 N. Y. 927 ..... 6, 7
Pennoyer v. Neff, 1877, 95 U. S. 714, 24 L. Ed. 565 35
Plessy v. Ferguson, 1896, 163 U. S. 537 ..... 80, 83
Powell v. Alabama, 1932, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527 ..... 57, 67, 81

Railway Express Agency, Inc. et al. v. New York, 336 U. S. 106 84
Raymond v. Chicago Union Traction Co., 1907, 207 U. S. 20 ..... 70, 71
Rogers v. Peck, 199 U. S. 425, 434, 26 S. Ct. 87, 50 L. Ed. 256 66
Rose v. Himeley, 1808, 4 Cranch, 241, 2 L. Ed. 608 34

70 L. Ed. 322 37
Simon v. Craft, 1901, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165 35
Smith v. Cahoon, 283 U. S. 553 84
Smith v. O'Grady, 1941, 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859 ..... 57, 81
Smyth v. Ames, 1898, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 55
Snyder v. Massachusetts, 291 U. S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674, 90 A. L. R. 575 66

PAGE

State v. Izard, 14 Rich. (S. C.) 209 54
State v. Noble, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143 ..... 51, 52, 73, 74
State v. West, 39 Minn. 321, 40 N. W. 249 54
"Statutory Presumptions as Devices to Facilitate the Proof of Crimes," Note, 1928, 28 Col. L. Rev. 489 43
Sullivan v. State, 44 Wis. 595 54

The Appollon, 1824, 9 Wheat. 362, 6 L. Ed. 111 34
Tot v. United States, 1943, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 42
Truax v. Corrigan, 1921, 257 U. S. 312 79

United States v. Cohen Grocery Co., 1921, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516 ..... 21, 36, 38, 39
United States v. Cruickshank, 1876, 92 U. S. 542, 552, 23 L. Ed. 588 ..... 20, 21, 36
United States v. Dickson, 15 Pet. 162, 10 L. Ed. 689 ....51, 73

Virginia, Ex parte, 1880, 100 U. S. 339 .....48, 56, 70, 71, 78

Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678 66
Western & Atlantic R. R. v. Henderson et al., 1929, 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884 ..... 41, 42
Wilkinson, Vernon L., "The Federal Bill of Rights and the Fourteenth Amendment," 26 Geo. L. J. 439, 1938.. 39
Wright v. People, 33 Mich. 300 54

Yarborough, Ex parte, 1884, 110 U. S. 651 33
Yick Wo v. Hopkins, 1886, 118 U. S. 356 .....10, 11, 56, 70, 71, 78, 80, 83

IN THE

Supreme Court of the United States

October Term, 1953

No.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

—against—

MORRIS S. KITZEN,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of Morris S. Kitzen, an American citizen, respectfully shows:

Summary Statement of Matter Involved

The petition is by the defendant-appellant for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered the 22nd day of May, 1953, affirming an order of the Appellate Division of the Supreme Court of New York in the first judicial department, entered October 21, 1952, which unanimously affirmed an order of the Court of Special Sessions of the City of New York, of the County of New York, denying an application by defendant-appellant or a motion for a writ of error *coram nobis* to vacate a judgment of conviction rendered against defendant-appellant on November 19,

1942, and to vacate a judgment of sentence imposed upon defendant-appellant on December 2, 1942, sentencing the defendant-appellant to one year's imprisonment in the New York County Penitentiary where the sentence of the court was served.

The defendant-appellant or petitioner herein contends that the conviction was obtained or procured in violation of the essential elements of due process of law in that the conviction was too vague, too indefinite and too uncertain, without a dividing line between guilt and innocence, between what is lawful and what is unlawful, between the act of which the accused was guilty and the act of which he was completely innocent, without a reasonable intendment and without a reasonable construction, and left the conviction—guilt and innocence—entirely to conjecture. The petitioner contends that the conviction cannot be so uncertain that it will reasonably admit of different constructions. The conviction, and the elements constituting it, such as responsiveness to the charges and consistency, must be so clearly expressed that the ordinary accused can intelligently choose what course to pursue. A conviction providing a punishment should not admit of such a double meaning that the accused may act upon the one conception of its sufficiency and requirements and the courts upon another. The indefiniteness of the conviction itself renders it incapable of application. One part might convict and the other part might exonerate, but no one could ever tell which the court had in mind and it is thus left to nothing but conjecture. In rendering the general verdict, the court failed to separate innocence from guilt, failed to state specifically of what offense the defendant was guilty and of what offense he was innocent and failed to draw a dividing line between the lawful and the unlawful and thus failed to satisfy the first essential elements of due process of law—definiteness, certainty, ascertainable language, by not removing confusion and conjecture.

Material Facts

On July 27, 1942, in New York County, in the City of New York, the defendant-appellant was arrested and charged in an information under Section 1290 of the Penal Law with the crime of false pretenses under Count 1 and with the crime of common-law larceny of the very same property or moneys under Count 2, the charges arising out of a settlement of a negligence action by the defendant-appellant as attorney on behalf of a client named Albert Matthews with an insurance company, known as the Security Taxpayers Insurance Company.

The crime or crimes are alleged to have been committed on March 9, 1942, by the defendant-appellant at the very same time.

On July 28, 1942, the defendant-appellant pleaded not guilty.

In November, 1942, the defendant-appellant was supposed to be tried in the Court of Special Sessions, New York County, in the City of New York, for:

1. The crime of false pretenses, obtaining property by false pretenses, obtaining title by false pretenses, obtaining title by fraud, with intent to deprive the owner, a statutory crime, under Count 1; or

2. The crime of common-law larceny by stealing, taking and carrying away, taking and carrying away personal property with intent to deprive the owner of it permanently, an act of trespass and asportation of personal property, with intent to deprive the owner, trespass and asportation of the very same property or moneys under Count 2.

At the close of the trial, the court announced its verdict "the Court finds the defendant guilty," a general verdict upon a plea of not guilty, which imports a conviction of the offense charged in the information or in the indict-

ment within the meaning of Section 437 of the Code of Criminal Procedure and within the meaning of the decisions of cases by the appellate courts of the State of New York.

At the time of the rendition of the general verdict by the trial court, no objection was raised to the propriety of the general verdict by the counsel for the defendant. Nor did he raise the question of mode of trial thereunder or of election of counts thereunder.

This general verdict or conviction was misleading, misguiding and conjectural. It violated the first essential element of due process of law in that it lacked definiteness and certainty as to what the court meant—whether the court meant a general verdict of the offense of false pretenses under Count 1 or the offense of common-law larceny under Count 2. No one could ever tell whether it was a conviction of the offense supported by evidence or a conviction unsupported by any evidence at all. The court might have intended one offense or the other. It might have convicted the defendant-appellant or accused of the wrong offense and sentenced him to imprisonment for an offense he had never committed, as it did.

It was so vague in terms that men of common intelligence must have necessarily guessed at its meaning and differed as to its application and for this reason violated the first essential of due process of law. Such conviction vitiated the procedure and the jurisdiction of the court. Under such exercise of arbitrary power, the accused was left without protection against criminal procedure and against unduly severe criminal punishment, as by imprisonment.

It is well settled in constitutional law that the due process clauses apply to all rules of judicial procedure, whether they are the products of judicial decision or of legislative enactment. Due process relates only to the validity of the resulting rule and not to the manner in which the judicial determination was rendered.

The appellant asks the Supreme Court of the United States to review not the wisdom of the judges' philosophies, but the legality of their acts—the legality of the rule that blocked fairness, justice, compliance with the essential elements of due process in a criminal proceeding. All courts in the State, all, taken one by one, refused to consider the violation of due process, refused to consider the indefiniteness and uncertainty, the conjecture, the unconstitutionality of the conviction just because the counsel for the defendant failed at the end of the trial to take an objection to the propriety of the general verdict on two distinct offenses where the types of evidence under Counts 1 and 2 were not identical and where the defendant might have been guilty of one offense but could never have been guilty of both at the same time and thus left the conviction entirely to conjecture, guesswork.

The Basis of This Court's Jurisdiction

The order sought to be reviewed was rendered by the Court of Appeals of the State of New York, at Albany, New York, and is dated May 22, 1953.

It involves peculiarly the due process clauses of the Fourteenth Amendment to the United States Constitution affecting the most cherished rights of Americans—all persons, aliens, as well as citizens, who are entitled to claim the protection of due process of law. It involves a title, right, privilege, or immunity specially set up or claimed under the Constitution. Such a question actually did arise in the case and did form the ground of the decree of the state court, adverse to the appellant or the party applying for the writ of certiorari.

The provisions involved are the due process clauses of the Fourteenth Amendment to the United States Constitution, known as Article XIV, Section I.

The state statute involved is the Penal Law of the State of New York, Section 1290, as it stood on March 9, 1942, or prior to the amendment of the Penal Law, Section 1290, which amendment became effective September 1, 1942 (Chapter 732, Laws of 1942, Sections 1, 2, 1290, 1290-a, Subdivisions 1 and 2, Sections 3 and 4).

The rule of law or rule of judicial procedure, relating to an objection to a general verdict, a product of judicial decision, involving an infringement upon or a deprivation of a constitutional right to due process of law in matters of procedure and in matters of substance in the course of the trial is clearly stated in the cases herein below.

People v. *Cummins,* 1912, 153 App. Div. 93, 138 N. Y. S. 517, 28 N. Y. Cr. R. 380, affirmed, 1913, 209 N. Y. 283, 103 N. E. 169, 30 N. Y. Cr. R. 330;

People v. *Dunn,* 1882, 90 N. Y. 104, reversing *Dunn* v. *People,* 27 Hun 272;

People v. *Sciascia,* 1944, 268 App. Div. 14;

People v. *Sciascia,* 1945, 294 N. Y. 927.

The jurisdiction of this Court is found in or is invoked under 28 U. S. Code, Annotated, Judicial Code, Section 1257, Subdivision 3, or Subsection 3.

Rule of Judicial Procedure—by Decision. Relevant Decisions

Objection to General Verdict.

Where indictment charged in separate counts larceny in common-law form and larceny as bailee, accused could not for first time on appeal complain of general verdict.

People v. *Cummins,* 1912, 153 App. Div. 93, 138 N. Y. S. 517, 28 N. Y. Cr. R. 380, affirmed, 1913, 209 N. Y. 283, 103 N. E. 169, 30 N. Y. Cr. R. 330.

Where objection taken by prisoner on trial was to sufficiency of indictment, and did not raise question of mode of trial thereunder, or of election of counts, question of propriety of rendition of general verdict cannot be raised for first time on appeal.

People v. *Dunn*, 1882, 90 N. Y. 104, reversing *Dunn* v. *People*, 27 Hun 272;
People v. *Sciascia*, 1944, 268 App. Div. 14;
People v. *Sciascia*, 1945, 294 N. Y. 927.

Petitioner submits that the petition should be granted for grounds of jurisdiction and for grounds of a substantial constitutional question which arose under the due process clauses of the Fourteenth Amendment to the Constitution of the United States—involving a title, right, privilege, or immunity specially set up or claimed under the Fourteenth Amendment of the United States Constitution.

The Supreme Court of the United States has jurisdiction through a writ of certiorari or on certiorari to review the state court's final judgment or decree or decision for the reason that the decision herein

1. was rendered by the Court of Appeals, the highest court of the State of New York. *Kentucky* v. *Powers*, 201 U. S. 1;

2. involved the due process clauses of the Fourteenth Amendment to the Constitution of the United States—a federal question. *Hammond* v. *Whittredge*, 204 U. S. 538; and

3. was based on a determination of the federal question. *Allen* v. *Arguimbau*, 198 U. S. 149.

It is not a case brought to it merely on the ground that a federal question might have formed the basis of the decision of the case.

In order to give the Supreme Court jurisdiction through a writ of certiorari, "it must appear affirmatively not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

De Saussure v. *Gaillard,* 127 U. S. 216;
See *Johnson* v. *Risk,* 137 U. S. 300.

The final decree or order of the Court of Appeals of the State of New York was entered on May 22, 1953. A petition is presented to the Supreme Court of the United States herewith, to wit, October Term, 1953, for a writ of certiorari to the Court of Appeals of the State of New York. The jurisdiction of the Supreme Court to review this decree or order or decision by writ of certiorari is conferred by Title 28, United States Code, Annotated, Section 1257, Subdivision 3, as follows:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

A right to due process of law is a constitutional right under the 14th Amendment of the Federal Constitution. A right to the essential elements composing due process is a constitutional right under the Constitution. All persons, aliens as well as citizens, are entitled to claim the protection of due process of law.

"In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. Mooney v. Holohan, supra. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed, and the judgment must be reversed."

Brown et al. v. *State of Mississippi,* 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682.

The facts and the law are these:

The case involves peculiarly an indefinite and uncertain conviction, violating the essential element of due process of law—certainty. The case involves peculiarly a rule of judicial procedure, a product of judicial decision, that an objection to the indefinite, uncertain, and conjectural conviction, general verdict, must be raised at the time of its rendition at the trial.

The defendant-appellant claimed in his application and on appeal to the Court of Appeals that it was an application in the nature of a writ of error *coram nobis* and

1. that due process is applicable to all rules of judicial procedure, whether they are the product of judicial deci-

sion or of legislative enactment, and that if the conviction and sentence are void for want of the essential elements of due process—certainty, the proceeding is vitiated, and due process must rise over and above a mere rule of court procedure, state practice. *Brown et al.* v. *State of Mississippi,* 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682.

2. that in the Court of Appeals in his brief, the district attorney assumed judicial power and acted as if judicial power had been delegated to him and thus acted as prosecuting officer and as judge at the same time and thereby violated due process in procedure and in substance by being both prosecuting officer and judge, on behalf of the State, clothed with State's power, by virtue of a public position under a State government.

That due process does not require provision for an appellate review, even in criminal cases. *McKane* v. *Durston,* 153 U. S. 684. But where an appeal is provided for, and availed of, the proceedings in the appellate court are to be considered in determining the question of due process. *Frank* v. *Mangum,* 237 U. S. 309.

3. that the equal protection clause of the 14th Amendment prohibits the States and the courts of the States and all agencies acting on behalf of the State which are clothed with the power of the State's authority from making unreasonable classifications in criminal procedure or in establishing their rules of criminal procedure, prohibits them from applying the same form of rule of judicial procedure in such manner and under such circumstances, as to be discriminative against the defendant-appellant in his case. *Yick Wo* v. *Hopkins,* 1886, 118 U. S. 356.

That laws which operate arbitrarily or unequally are inconsistent with due process. *Giozza* v. *Tiernan,* 1893, 148 U. S. 657, 13 S. Ct. 721, 37 L. Ed. 599.

4. and that if the conviction and sentence were void for want of the essential element of due process of law,

certainty, the proceedings thus vitiated for want of jurisdiction could be challenged in any appropriate manner. *Brown et al.* v. *State of Mississippi*, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682.

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between people in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."
>
> *Yick Wo* v. *Hopkins*, 1886, 118 U. S. 356.

Despite all these allegations of facts and law, the Court of Appeals (May 22, 1953) affirmed the order of the Appellate Division of the Supreme Court of New York (October 21, 1952) which unanimously affirmed the order of the Court of Special Sessions (April 24, 1952), denying appellant's application to vacate the unconstitutional conviction and sentence. The decree or order of the Court of Appeals did not recite anything about the appellant's express invocation of the Fourteenth Amendment. The Court of Appeals entertained the challenge, considered the federal question thus presented in the record and in the briefs, but declined to enforce petitioner's constitutional right, declined to pass upon the federal right fully established and specially set up and claimed.

The defendant-appellant then made a motion for leave to reargue the appeal or in the alternative to amend the remittitur of the Court of Appeals so as to show that a federal question was involved and that the decision by the highest Court of the State was based on a determination of the federal questions; that federal questions had been presented to the Court of Appeals and had been passed

upon by the Court of Appeals. This motion was returnable on July 13, 1953. On July 14, 1953, the Court of Appeals denied the motion for leave to reargue the appeal and denied also the motion to amend the remittitur which would show just what federal questions or federal rights have been specially set up and claimed under the Constitution and been passed upon by the Court of Appeals.

Therefore, through a writ of certiorari, the defendant-appellant asks the Supreme Court of the United States, the guardian or custodian of our constitutional rights, in the interests of our sacred rights granted to us, the American people, to review the facts and the law, the federal right or rights, to determine for itself whether the act complained of is arbitrary, discriminative, and unequal within the meaning of the Constitution, and whether it should or not be bound by the characterization employed by the State courts.

Every court in the State of New York denied the application without opinion, although the federal right to the essential elements of due process of law under the 14th Amendment of the Constitution was specially set up and claimed in the papers and although the defendant-appellant explained and contended that the conviction was repugnant to the due process clauses of the 14th Amendment and inconsistent with the necessary requisites of due process of law. It was inconsistent with due process because it lacked certainty—a reasonable intendment and could not receive a reasonable construction. It was a conviction left entirely to conjecture, and the district attorney in the Court of Appeals could not substitute his own personal judgment for the personal judgment of the trial court.

Under such circumstances, the defendant-appellant never had like access to the courts for the protection of his liberty, for the redress of wrongs, where the federal right

specially set up and claimed under the due process clauses of the 14th Amendment was properly discussed and determined and although the defendant-appellant properly presented the federal right to the Court of Appeals, it arbitrarily and unequally denied the motion to amend the remittitur, without offering the defendant-appellant an opportunity to enable him to bring his right within the jurisdiction of the Supreme Court of the United States on the ground that it involves a substantial federal right under the Constitution. Under such circumstances the defendant-appellant has great difficulty in showing that the Court of Appeals actually passed upon that question and he is thereby denied a fundamental and substantial right guaranteed to him by the Constitution.

In the instant case, the Court of Appeals was fully advised by the undisputed evidence of the way in which the conviction had been procured. The Court of Appeals knew from the record and the briefs that the conviction was conjectural, that the evidence under Count 1 and the evidence under Count 2 were not identical, consistent or inconsistent. Yet it proceeded to deny appellant's motion to reargue the appeal or to amend the remittitur so that the appellant might test the erroneous conviction by the essential elements of due process in the Supreme Court of the United States. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. The Court of Appeals entertained the challenge, considered the federal question thus presented, but declined to say whether there is or is not a federal right, declined to enforce petitioner's constitutional right. The Court thus denied a federal right fully established and specially set up and claimed, and the petitioner now asks the Supreme Court not to be bound by matters of form, but should weigh the substantial federal right denied the petitioner

herein. Should the petitioner be denied the right to be heard in the Supreme Court of the United States, then, there is no court in the State and in the country to tell exactly whether the petitioner's right ever rose to the dignity of a federal right under our Constitution and the petitioner would thereby suffer a great injustice.

A federal question of substance has been properly framed before the Court of Special Sessions, the original trial court, the Appellate Division of the Supreme Court of New York, and the Court of Appeals, the highest court in the State. It has been raised in the application or motion for a writ of error *coram nobis* in all the courts of the State. The petitioner properly raised the federal question of indefiniteness, uncertainty, conjecture, and the failure on the part of the Court of Appeals to deal with it was not for want of proper presentation. In the Court of Appeals, the petitioner submitted the record and six briefs arguing the federal question of substance, but the highest court in the State failed or refused to pass expressly upon the federal question. If the federal question in this case was necessary to a determination of the case and if there was no adequate non-federal ground of decision apparent, the petitioner feels that for these reasons alone the Supreme Court can take jurisdiction over the case. Under such circumstances, the refusal to pass upon the federal question is just as reviewable as an express decision on the point. Under those circumstances, in the absence of an adequate non-federal ground of decision, there should have been a federal ground of decision.

It is proper to raise the federal question on a motion for a new trial (*Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 231-2), but petitioner had no grounds for a motion for a new trial in this case. Petitioner did have grounds for a motion for a writ of error *coram nobis* and in his application or affidavit did raise the federal ques-

tion—the right to due process under the 14th Amendment, and this federal question was clearly presented before all the courts of the State in sworn assertions.

In this case, it cannot be said that the silence is due to the procedural deficiency, for it was raised in the trial court upon the motion for a writ of error *coram nobis* to vacate the unconstitutional conviction. Such situations were before the Court of Appeals on several occasions. It reversed convictions in *coram nobis* proceedings where there had been no objections raised to the general verdict at the time of its rendition at the trial and where there was proof that the convictions had been obtained or procured by means of fraud or misrepresentation of facts or obtained or procured through a violation of a constitutional right to due process of law under the 14th Amendment to the Constitution of the United States not otherwise reached by judicial process or not otherwise subject to review. Under such conditions as described herein, the Supreme Court itself has the power to examine into the raising of the federal question and if it is convinced that the highest state court's refusal to deal with that question is a mere evasion, the Supreme Court's jurisdiction can be asserted.

There was no procedural deficiency herein. The petitioner followed the state procedures in raising the federal question.

The law of the State of New York made it proper to raise federal questions on a motion for a writ of error *coram nobis* to vacate an erroneous judgment of conviction. If it is permissible under state procedure or state law, as it is in this case, to raise the federal question for the first time in a motion for a writ of error *coram nobis*, on such a motion, the Supreme Court should review a judgment or decree to that effect. Under New York law, the *coram nobis* motion permits the raising of such federal questions, despite any tardiness in their assertion. New York law

recognizes and employs the common law writ of error *coram nobis* which, in circumstances in which habeas corpus will not lie, may be issued by the trial court as a remedy for infringement of constitutional right of the defendant in the course of the trial. That remedy has been sought, but without avail, and we cannot say that petitioner's state remedies have not been exhausted.

Generally and particularly, very minutely, the petitioner followed the New York State procedures in raising the federal question in a motion for a writ of error *coram nobis* to vacate the unconstitutional conviction on the ground that it was procured or obtained through a violation of a constitutional right in the course of the trial not otherwise reached by judicial process, not otherwise subject to judicial review, and for these reasons there ought to be a Supreme Court review.

The federal question was properly raised before the trial court in a motion for a writ of error *coram nobis,* and the question was also pursued on appeal to higher state courts, under state procedure, where state procedure so permits or requires, and it was pursued in the manner specified by the state rules of practice. The state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law. The petitioner followed the appellate channels provided by the State of New York in applications for writs of error *coram nobis.* The record in all the state courts affirmatively shows a raising of the federal issue in all the state courts, and the record is a part of the state court proceedings, and it can be used to establish that a federal question was raised.

In the State of New York, it was the Court of Appeals that initiated or established the *coram nobis* proceeding whereby on an application of sworn assertions or in a motion for a writ of error *coram nobis* the petitioner could

raise federal rights granted under the due process clauses of the 14th Amendment and of which rights the petitioner was deprived in the course of the trial in one way or another. In the leading cases of *Matter of Lyons* v. *Goldstein*, 1943, 290 N. Y. 19, the Court of Appeals laid down the rule of law by decision that power to hear a motion to vacate a judgment of conviction in the nature of the common law writ of error *coram nobis* was inherent in the trial court. In *Matter of Morhous* v. *N. Y. Supreme Court*, 1944, 293 N. Y. 131, the Court of Appeals outlined the three proceedings that are open to an accused in this State, as follows:

> 1. An appeal to a higher court for error at the trial and appearing in the record;
>
> 2. A motion to vacate the judgment and for a new trial for defect not appearing on the record, or
>
> 3. Where for any other reason an appeal would not furnish a remedy.

In *Matter of Hogan* v. *Court of General Sessions*, 1946, 296 N. Y. 6, the Court of Appeals ruled that the remedy does not embrace such errors of law or of fact or constitutional questions as might be considered upon an appeal or upon a motion for a new trial. If the defendant had a right of appeal from the judgment or could have made a motion to vacate the judgment and for a new trial, he is not entitled to an application for a writ of error *coram nobis* to vacate the judgment of conviction and the judgment of sentence. The motion to vacate the judgment is granted to an accused where for any other reason—because of failure to raise objection to the general verdict or unconstitutional verdict at the time of its rendition at the trial—an appeal would not furnish a remedy.

Thus, in accordance with these laws establishing for the first time in the State of New York the *coram nobis* proceeding, the Court of Appeals reversed the following cases:

Matter of Lyons v. *Goldstein*, 1943, 290 N. Y. 19;
People v. *Richetti*, 1951, 302 N. Y. 290;
People v. *Langan*, 1952, 303 N. Y. 474.

It did not reverse the defendant-appellant's conviction on grounds of uncertainty.

In each of the above cases, there was a general verdict, an unconstitutional conviction under a general verdict, there was no objection raised to the general verdict at the time of its rendition at the trial, and there was a reversal of the judgment of conviction on grounds of denials of due process committed in the course of the trial. The theory in each of these cases was this: If the defendant had a right, a constitutional right to due process of law then at the trial, of which he had been deprived in the course of the trial, he has that right now and has a right now to move to vacate the judgment of conviction; he has that right now to raise the federal question, the federal right fully established and specially set up and claimed in a *coram nobis* proceeding. The Court of Appeals entertained the challenge, heard the appeal, but declined to enforce petitioner's constitutional right. The highest state court was completely silent on the federal question. It refused to pass upon the federal question. And this silence was not due to the procedural deficiency, for the petitioner followed strictly state procedure in raising the federal question.

In furthering a proper understanding of the history of *coram nobis* in the State of New York, the petitioner sets forth herein the following outline:

Laws of 1947, chapter 706, amending Sections 517-519 of the Code of Criminal Procedure, was recommended by the Judicial Council. In *Matter of Lyons* v. *Goldstein*, 1943, 290 N. Y. 19, it was held that power to hear a motion to vacate a judgment of conviction in the nature of the common law writ of error *coram nobis* was inherent in the trial court. In *People* v. *Gersewitz*, 294 N. Y. 163, 1945, the Court of Appeals held that no appeal could be taken from an order denying a motion to vacate a judgment of conviction in the absence of statutory provision. Similarly, no appeal would lie from an order granting such a motion to vacate. A one-sided and inadequate method of handling the situation was established by *Matter of Hogan* v. *Court of General Sessions of the County of New York*, 296 N. Y. 1, 1946, in which an order, under Article 78 of the Civil Practice Act, in the nature of prohibition was granted to prevent the court from acting on such a motion to vacate a judgment of conviction. To remedy the situation, the Judicial Council recommended, as proposed in this bill, that an appeal be permitted from an order granting or denying a motion to vacate a judgment of conviction.

To this degree or extent, in order to do justice, in order to save the life—the physical and the professional life of the petitioner, to save his education, career, future, and good name in society, in the state and in the nation, including the freedom from an erroneous, an unwarranted and a wrong conviction, not in consonance with our principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, the petitioner urges the Supreme Court of the United States to go behind the action of the highest state court and examine into the raising of the federal question and if it is convinced that the highest state court's refusal to deal with that question is a mere evasion, the Supreme Court's jurisdiction should be asserted. It is of substantial im-

portance to all Americans, and also to aliens, who seek the protection of due process of law under the 14th Amendment to the Constitution, to secure the national rights and uniformity of judgments, to defend class actions.

Here it is not a question of whether or not the decision below is erroneous. There is a serious conflict with another appellate court and the question presented is sufficiently important for the Supreme Court to review, or the decision below calls for an exercise of the Supreme Court's supervisory powers. The question is important—the issue is a conviction obtained or procured through a violation of the first essential element of due process of law in the course of the trial, and the question is also the existence of a conflict with another appellate court—between the decision as to which review is sought and that rendered by the Supreme Court or some lower court whose judgment is final in the absence of Supreme Court review. In this case, there is a conflict between a decision of the highest state court, the Court of Appeals of New York, and that of the Supreme Court on matters of federal law—a right claimed under the 14th Amendment of the Constitution. The case involves a decision of the highest state court on a substantial and unsettled federal question arising under the 14th Amendment to the Constitution and despite the fact that the highest state court is completely silent on the federal question the Supreme Court should grant the petition for writ of certiorari.

The conflict is direct, with a case in another appellate court or a Supreme Court decision which is substantially indistinguishable (*United States* v. *Cruickshank*, 1876, 92 U. S. 542; *International Harvester Co.* v. *Kentucky*, 1914, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284; *United States* v. *Cohen Grocery Co.*, 1921, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516; *Connally* v. *General Construction Co.*, 1926, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322; *Lanzetta* v.

State of New Jersey, 1939, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888; *Herndon* v. *Lowry*, 1937, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066).

The decision of the highest court of the state conflicts with the essential element of definiteness and certainty laid down in the case of *United States* v. *Cruickshank, supra.*

It conflicts with the decision in *International Harvester Co.* v. *Kentucky, supra,* holding that vagueness is a denial of the first essential of due process of law.

It conflicts with the decision in *United States* v. *Cohen Grocery Co., supra,* holding that indefiniteness is a denial of the first essential element of due process of law.

It conflicts with the decision in *Connally* v. *General Construction Co., supra,* holding that a conviction cannot rest upon an uncertain foundation.

It conflicts with the opinion of the Supreme Court in the case of *Lanzetta* v. *State of New Jersey, supra,* holding that a conviction cannot rest upon uncertainty of meaning of statute.

It conflicts with the decision in the case of *Herndon* v. *Lowry, supra,* holding that a conviction under a statute admitting of double meaning cannot be sustained.

The case is also important, affecting the most cherished rights of citizens and aliens who have been erroneously convicted. A countless number of other persons, apart from the actual petitioner, will be affected by the Supreme Court's decision on a conjectural conviction, which denies the first essential element of due process of law. It is not important because it is of a substantial consequence primarily to the particular person, the petitioner herein.

The action of the highest court in the state shows the erroneous nature of the decision. The decision represents a gross miscarriage of justice or an erosion of a fundamental right under the Constitution. The decision below is thought to be wrong because a federal question was pre-

sented and called for an express decision on the right under the 14th Amendment. There is a strong doubt as to the correctness of the decision by reason of the evasion or refusal to deal with the right specially set up and claimed under the 14th Amendment.

The petitioner herein requests the Supreme Court to arbitrate the conflicts among the lower courts and to determine questions of importance. The petitioner presented the type of issue involved, the status of the law on the matter, the correctness of the decision below, and the nature and number of persons who may be affected by the case—aliens as well as citizens of the United States. It will affect the plans, hopes, and aspirations of a great many people throughout the country.

The decision in the state court did not involve an adequate and independent non-federal ground. Whatever questions were presented to the state court were of a federal nature. It could not be based upon any non-federal ground, for there were none. The federal question was properly asserted in all the state courts. Thus the failure of the state court to pass upon the federal claim is not conclusive. From that court the cause may be brought here to the Supreme Court for review if an appropriate federal question is properly presented.

In *Ex Parte Hawk,* 1944, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, the Supreme Court of the United States alleges the following facts:

> "Motion for Leave to File Petition for Writ of Habeas Corpus.
>
> "PER CURIAM. This case comes here on petitioner's application for leave to file in this Court his petition for writ of habeas corpus. Petitioner is confined in the Nebraska State Penitentiary under sentence for murder imposed by the Nebraska District Court.

"His present proceeding has been prefaced by several earlier applications to both state and federal courts. His petition for habeas corpus was denied without a hearing by the Nebraska District Court whose decision was affirmed by the Nebraska Supreme Court, Hawk v. O'Grady, 137 Neb. 639, 290 N. W. 911. This Court denied certiorari, 311 U. S. 645. Petitioner then filed in the United States District Court for Nebraska a petition for habeas corpus, alleging matters not previously brought to the attention of the state courts. This application was denied without a hearing, and the Circuit Court of Appeals for the Eighth Circuit affirmed on the ground that petitioner had not exhausted his state remedies, Hawk v. Olson, 130 F. 2d 910. We denied certiorari. 317 U. S. 697. Petitioner then urged his present contentions upon the Nebraska Supreme Court in a petition for writ of habeas corpus which that court denied without opinion. We denied his petition for habeas corpus upon like allegations but without prejudice to presentation of the matters alleged to the United States District Court, Ex parte Hawk, 318 U. S. 746.

"Petitioner accordingly renewed his petition for writ of habeas corpus to the United States District Court for Nebraska and filed a like petition with the senior Circuit Judge for the Eighth Circuit; both petitions have been denied, and leave to appeal to the Circuit Court of Appeals for the Eighth Circuit has been denied by the senior Circuit Judge of that circuit. Petitioner thereupon filed the present application in this Court.

"In the application now before us, and in those filed with the United States District Court and the senior Circuit Judge of the Eighth Circuit, petitioner alleges, among other things, that the state court forced him

into trial for a capital offense, Neb. Comp. Stat. #28-401, with such expedition as to deprive him of the effective assistance of counsel, guaranteed by the due process clause of the Fourteenth Amendment, Powell v. Alabama, 287 U. S. 45; see Smith v. O'Grady, 312 U. S. 329; compare Betts v. Brady, 316 U. S. 455, and that his conviction was based in part on the introduction at the trial of evidence known by the prosecution to be perjured, Mooney v. Holohan, 294 U. S. 103."

In the same case of *Ex Parte Hawk,* cited above, the Supreme Court of the United States says the following:

"From our examination of the papers presented to us we cannot say that he is not entitled to a hearing on these contentions, Walker v. Johnston, 312 U. S. 275, 284-7; Holiday v. Johnston, 313 U. S. 342, 350; Waley v. Johnston, 316 U. S. 101, 104-5; Cochran v. Kansas, 316 U. S. 255, 258. But, as was pointed out by the District Court and Circuit Judge, petitioner has not yet shown that he has exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge.

"So far as appears, petitioner's present contentions have been presented to the state courts only in an application for habeas corpus filed in the Nebraska Supreme Court, which it denied without opinion. From other opinions of that court it appears that it does not usually entertain original petitions for habeas corpus, but remits the petitioner to an application to the appropriate district court of the state, from whose decision an appeal lies to the state Supreme Court, Williams v. Olson, 143 Neb. 115, 8 N. W. 2d 830, 831; see In re White, 33 Neb. 812, 814-15, 51 N. W. 287. From that court the cause may be brought here for review if an appropriate federal question is properly presented.

"Of this remedy in the state court petitioner has not availed himself. Moreover, Nebraska recognizes and employs the common law writ of error coram nobis which, in circumstances in which habeas corpus will not lie, may be issued by the trial court as a remedy for infringement of constitutional right of the defendant in the course of the trial. Carlsen v. State, 129 Neb. 84, 94-8, 261 N. W. 339. Until that remedy has been sought without avail we cannot say that petitioner's state remedies have been exhausted.

"Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. Tinsley v. Anderson, 171 U. S. 101, 104-5; Urquhart v. Brown, 205 U. S. 179; United States ex rel. Kennedy v. Tyler, 269 U. S. 13; Mooney v. Holohan, supra, 115; Ex parte Abernathy, 320 U. S. 219. And where those remedies have been exhausted this Court will not ordinarily entertain an application for the writ before it has been sought and denied in a district court or denied by a circuit or district judge. Ex parte Hawk, supra; Ex parte Abernathy, supra.

"The denial of relief to petitioner by the federal courts and judges in this, as in a number of other cases, appears to have been on the ground that it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.' See In re Anderson, 117 F. 2d 939, 940; In re Miller, 126 F. 2d 826, 827; Kelly v. Ragen, 129 F. 2d 811, 814-15; Hawk v.

Olson, supra, 911-13; Marsino v. Hogsett, 37 F. 2d 409, 414; United States ex rel. Foley v. Ragen, 52 F. Supp. 265, 269-270; cf. United States ex rel. Murphy v. Murphy, 108 F. 2d 861, 862. To this, some courts have added the intimation that when the writ is sought by one held under a state conviction the only remedy ordinarily to be had in a federal court is by way of application to this Court. Ex parte Jefferson, 106 F. 2d 471, 472; Kramer v. Nevada, 122 F. 2d 417, 419; In re Miller, supra; Hawk v. Ilson, supra, 913; cf. Kelly v. Ragen, supra, 814.

"The statement that the writ is available in federal courts only 'in rare cases' presenting 'exceptional circumstances of peculiar urgency,' often quoted from the opinion of this Court in United States ex rel. Kennedy v. Tyler, supra, 17, was made in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right.

"Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. Salinger v. Loisel, 265 U. S. 224, 230-32. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see Mooney v. Holohan, supra, 115, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. Moore v. Dempsey, 261 U. S. 86; Ex parte Davis, 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would

be remediless. In such a case he should proceed in the federal district court before resorting to this Court by petition for habeas corpus.

"As petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice to his resort to the procedure indicated as appropriate by this opinion.

"Application denied."

Questions Presented

1. Whether or not the due process clauses of the Fourteenth Amendment to the United States Constitution apply to all rules of judicial procedure, whether they are the product of judicial decision or of legislative enactment; and whether or not a state court can conceive and enforce a rule of state practice and procedure regarding objections to general verdicts in such manner as will make the rule of judicial procedure take precedence over the essential elements of due process of law in matters of procedure and substance.

2. Whether or not the district attorney or prosecuting authority, an officer acting for the state, may claim that judicial power was delegated to him and whether or not he may substitute his personal judgment for the personal judgment of the trial court where the judges must decide cases according to the law and the facts, and not in accordance with their own opinions and ideas.

3. Whether or not the equal protection clause of the Fourteenth Amendment to the Constitution of the United States prohibits the states from making unreasonable classifications in establishing their rules of criminal procedure.

4. Whether or not a conviction which was obtained or procured through a violation of the first essential element of due process of law, certainty, should be vacated or set

aside on the ground of its being repugnant to the essential elements of due process of law of the 14th Amendment to the Constitution of the United States, on the ground of its being inconsistent with the essential elements of due process of law, for want of the essential element of due process of law—certainty, definiteness, ascertainable language, as set forth hereinafter, and whether or not the conviction and sentence imposed or pronounced should be declared void for want of the essential elements of due process, and whether or not the proceeding thus vitiated could be challenged in any appropriate manner.

Relevant Constitutional and Statutory Provisions

Article XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PENAL LAW OF THE STATE OF NEW YORK SECTION 1290. LARCENY DEFINED.

A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, with-

holds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property, and is guilty of larceny.

Reasons for Allowance of the Writ

1. The due process clauses of the Fourteenth Amendment of the Constitution of the United States are the most important, the widest, the most extensive and the most comprehensive provisions in the Federal Constitution.

The requirement of due process operates as a general limitation on all branches of government—on all government activity, whether state or federal, whether legislative, executive, or judicial. It contains substance and procedure. It applies to the ways of doing things and to the contents of the things done. It applies to matters of substance as well as to matters of procedure. It protects all persons, all property interests, and all personal and political rights and privileges against arbitrary, unfair, unjust, and unreasonable government action. It is a vague phrase, a fluid phrase, but its very vagueness requires that it be subject to judicial construction in accordance with the facts and circumstances of the particular case presented before the court. Many things and many circumstances have to be

taken into consideration. The historical and economic background and the attitudes of thought, the philosophies of the times, of the period during which the case arises also play an important and influential part in determining the extent, the distance or space which a thing covers, the scope that is to be given to the phrase "due process of law," of the Fourteenth Amendment, to the Constitution of the United States, the supreme law of the land.

"This phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," in the language of Justice Roberts.

2. "The state is free to regulate the procedure of its courts in accordance with its own conception of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v. Massachusetts, supra; Rogers v. Peck, 199 U. S. 425, 434, 26 S. Ct. 87, 50 L. Ed. 256. The state may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232; Snyder v. Massachusetts, supra. But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. Moore v. Dempsey, 261 U. S. 86, 91, 43 S. Ct. 265, 67 L. Ed. 543. The state

may not deny to the accused the aid of counsel. Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527. Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' Mooney v. Holohan, 294 U. S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A. L. R. 406. And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' Hebert v. Louisiana, 272 U. S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A. L. R. 1102. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

"2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction

and sentence wholly void. Moore v. Dempsey, supra. We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assured that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In Fisher v. State, 145 Misc. 116, 134, 110 So. 361, 365, the court said: 'Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country. . . . The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.'

"In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. Mooney v. Holohan, supra. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal ques-

tion thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed, and the judgment must be reversed.

"It is so ordered."

Brown et al. v. *State of Mississippi*, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682.

3. The wording of the due process clauses and the equal protection clauses of the 14th Amendment should be contrasted with that of the privileges and immunities clause and the contracts clause. The contracts clause prohibits a state from passing laws impairing the obligation of contracts and has consequently been construed as applicable only to state legislative action. The privileges and immunities clause prohibits a state from passing or enforcing certain laws; it is thus directed against legislative action or executive acts based thereon. While it is true that Congress may provide for the punishment of individuals interfering with the privileges of United States citizens, that power is derived not from the 14th Amendment but from the power of the federal government to maintain its supremacy. See *Ex parte Yarborough*, 1884, 110 U. S. 651.

The due process and equal protection clauses, on the other hand, declare only that no state shall do certain acts; they are therefore in no way limited to the activity of a particular branch of state government, but apply to all forms of state activity.

4. While due process of law may be a vague phrase, may be incapable of exact definition, the decisions show that the following are essential elements of it and further illustrate the effect of the due process clauses on other phases of judicial conduct.

Due process cannot be deemed to be satisfied by mere notice and hearing. It is no longer satisfied by having the necessary requisites of due process, such as

1. The right to be informed of the nature and cause of the accusation;

2. The right to be confronted with witnesses;

3. The right to have compulsory process for obtaining witnesses;

4. The right to have the assistance of counsel; and

5. The right to be prosecuted fairly. There are further requisites:

a.—Jurisdiction—the right to declare the law—is the foundation of due process. Law is *prima facie* territorial and governs only within the territorial limits of the authority from which it emanated. In *Rose* v. *Himeley,* 4 Cranch, 241, 2 L. Ed. 608, 1808, Chief Justice Marshall said, "It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law without the circle in which that law operates"; and in *The Appollon,* 9 Wheat. 362, 6 L. Ed. 111, 1824, he said, "The laws of no nation can justly extend beyond its own territories, except as regards its own citizens." These statements were made with regard to international relations, but the same principle applies in the relations of the States, and is an essential element in due process. In *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 37 S. Ct. 152, 61 L. Ed. 386, 1917, the Court said that "to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend

the authority and control of a State beyond its own territory." See also *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 29 S. Ct 511, 53 L. Ed. 826, 1909, and *McDonald* v. *Mabee*, 243 U. S. 90, 37 S. Ct. 343, 61 L. Ed. 608, 1917.

b.—Notice and hearing are an essential requisite of due process of law in judicial proceedings. No one may be convicted of crime or deprived of his liberty or property without notice of the charge or claim against him and an opportunity to be heard. See *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565, 1877; *Louisville & Nashville Ry.* v. *Schmidt*, 177 U. S. 230, 20 S. Ct. 620, 44 L. Ed. 747, 1900; *Simon* v. *Craft*, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165, 1901; *Londoner* v. *Denver*, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103, 1908.

c.—Laws which operate arbitrarily or unequally are inconsistent with due process. In *Giozza* v. *Tiernan*, 148 U. S. 657, 13 S. Ct. 721, 37 L. Ed. 599, 1893, the Court said: "Due process of law within the meaning of the Amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

On laws which operate arbitrarily or unequally and are inconsistent with due process, the Supreme Court of the United States speaks in specific language in the case of *Giozza* v. *Tiernan*, 148 U. S. 657, 13 S. Ct. 721, 37 L. Ed. 599, 1893, and lays down these rules:

"The amendment does not take from the States those powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under

Due process cannot be deemed to be satisfied by mere notice and hearing. It is no longer satisfied by having the necessary requisites of due process, such as

1. The right to be informed of the nature and cause of the accusation;

2. The right to be confronted with witnesses;

3. The right to have compulsory process for obtaining witnesses;

4. The right to have the assistance of counsel; and

5. The right to be prosecuted fairly. There are further requisites:

a.—Jurisdiction—the right to declare the law—is the foundation of due process. Law is *prima facie* territorial and governs only within the territorial limits of the authority from which it emanated. In *Rose* v. *Himeley,* 4 Cranch, 241, 2 L. Ed. 608, 1808, Chief Justice Marshall said, "It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law without the circle in which that law operates"; and in *The Appollon,* 9 Wheat. 362, 6 L. Ed. 111, 1824, he said, "The laws of no nation can justly extend beyond its own territories, except as regards its own citizens." These statements were made with regard to international relations, but the same principle applies in the relations of the States, and is an essential element in due process. In *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 37 S. Ct. 152, 61 L. Ed. 386, 1917, the Court said that "to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend

the authority and control of a State beyond its own territory." See also *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 29 S. Ct 511, 53 L. Ed. 826, 1909, and *McDonald* v. *Mabee*, 243 U. S. 90, 37 S. Ct. 343, 61 L. Ed. 608, 1917.

b.—Notice and hearing are an essential requisite of due process of law in judicial proceedings. No one may be convicted of crime or deprived of his liberty or property without notice of the charge or claim against him and an opportunity to be heard. See *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565, 1877; *Louisville & Nashville Ry.* v. *Schmidt*, 177 U. S. 230, 20 S. Ct. 620, 44 L. Ed. 747, 1900; *Simon* v. *Craft*, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165, 1901; *Londoner* v. *Denver*, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103, 1908.

c.—Laws which operate arbitrarily or unequally are inconsistent with due process. In *Giozza* v. *Tiernan*, 148 U. S. 657, 13 S. Ct. 721, 37 L. Ed. 599, 1893, the Court said: "Due process of law within the meaning of the Amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

On laws which operate arbitrarily or unequally and are inconsistent with due process, the Supreme Court of the United States speaks in specific language in the case of *Giozza* v. *Tiernan*, 148 U. S. 657, 13 S. Ct. 721, 37 L. Ed. 599, 1893, and lays down these rules:

"The amendment does not take from the States those powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under

like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order. Barbier v. Connolly, 113 U. S. 27, 31; In re Kemmler, 136 U. S. 436."

d.—Definite standards; definiteness and certainty in the language of indictment and statutes.

In the case of *United States* v. *Cruickshank*, 1876, 92 U. S. 542, 552, 23 L. Ed. 588, the Supreme Court of the United States held that under a statute punishing those who conspire to intimidate any citizen "with intent to prevent or hinder his free exercise or enjoyment of any right or privilege granted or secured to him by the Constitution of the United States," an indictment is too vague which charges the defendant with hindering citizens in the free exercise of "every, each, all and singular" of the rights granted them by the Constitution, without specifying any particular right.

An ascertainable standard of conduct to which it is possible to conform is an essential element of due process of law (*International Harvester Co.* v. *Kentucky*, 1914, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284; *United States* v. *Cohen Grocery Co.*, 1921, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516; *Connally* v. *General Construction Co.*, 1926, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322).

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 1921, it was held that the Food Control Act of 1917, which provided that it should be unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," did not establish any ascertainable standard of guilt nor inform accused persons of the nature and cause of the accusation against them. In substance it "penalized and

punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." Such a statute is repugnant to the due process clause of the Constitution.

Where a statute makes criminal a departure from a standard of conduct which it established, due process requires that such standard be sufficiently definite to enable persons to determine beforehand whether conduct which they contemplate will subject them to the statutory penalty.

An interesting case of uncertainty was presented by a New Jersey Statute which made it a criminal offense "to be a member of any gang." N. J. S. A. 2:136-4. Upon an analysis of the various definitions of the word "gang", the court held the statute to be invalid (*Lanzetta* v. *State of New Jersey,* 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888, 1939).

See 70 L. Ed. 322, for an annotation on indefiniteness and uncertainty of statutes. A civil statute is often said to be invalid because of indefiniteness. This does not determine that the purpose of the statute is unconstitutional, but merely that the indefiniteness of the statute renders it incapable of application. For a discussion of uncertainty in statutes see Aigler, Legislation in Vague Terms, 21 Michigan Law Review, 831, 1923.

The United States Supreme Court said that "where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained" (*Herndon* v. *Lowry,* 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066, 1937).

For further consideration of the provisions of due process, matters of procedure, which limit the National Government and are held applicable to the States, see:

a) Eminent domain:

Chicago, B. & Q. R. R. Co. v. *Chicago,* 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979, 1897, holding the State's taking of private property without just compensation to be a denial of due process.

b) Definiteness of criminal statute:

United States v. *L. Cohen Grocery Co.,* 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045, 1921, holding invalid Section 4 of the Lever Act, which made it a federal offense for anyone to exact any "unjust or unreasonable" charge in dealing with "any necessaries," as repugnant to the Fifth and Sixth Amendments because it set up no ascertainable standard of guilt. *Connally* v. *General Construction Co.,* 269, U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322, 1926, holding invalid a penal requirement that "not less than the current rate of per diem wages in the locality where the work is performed" shall be paid to persons employed on behalf of the State as violative of the due process clause of the Fourteenth Amendment. After conceding that the precise point of differentiation between statutes which are sufficiently definite and those which are not is "not easy of statement" the Court said: "But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, . . . or, as broadly stated by Mr. Chief Justice White in United States v. L. Cohen Grocery Co., 255 U. S. 81,

92, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' "

Lanzetta v. *New Jersey,* 306 U. S. 451, 1939, held invalid for vagueness a statute which provided that "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State, is declared to be a gangster," and subject to punishment. Cf. *Gorin* v. *United States,* 312 U. S. 19, 61 S. Ct. 429, 1941, discussed in 29 Calif. L. Rev. 548, 1941, which sustained the Espionage Act of 1917 punishing the performance of certain acts when done for the purpose of securing information "respecting the national defense with intent or reason to believe that the information so obtained is to be used to the injury of the United States or to the advantage of any foreign nation."

See Ralph W. Aigler, "Legislation in Vague or General Terms," 21 Mich. L. Rev. 831, 1923.

For an extensive discussion of the problem considered in principal cases, see Vernon L. Wikinson, "The Federal Bill of Rights and the Fourteenth Amendment," 26 Geo. L. J. 439, 1938.

In the case of *United States* v. *Cohen Grocery Co.,* 1921, 255 U. S. 81, 92, 41 S. Ct. 298, 301, 65 L. Ed. 516, 14 A. L. R. 1045, the Supreme Court of the United States, holding unconstitutional the Food Control Act of 1917 which penalized sales of necessaries at "unjust or unreasonable" prices, says:

"Observe that the section forbids no specific or definite act. It confines the subject matter of the in-

vestigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact . . . to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

In the case of *Connally* v. *General Construction Co.*, 1926, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322, the Supreme Court of the United States lays down the first essential of due process of law, saying:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; Collins v. Kentucky, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510."

In the case of *Connally* v. *General Construction Co.*, 1926, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322, the Supreme Court of the United States says:

"There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by

either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

'. . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.'"

5. Presumptions. To what extent does due process limit the power of a legislature to create presumptions?

For a statutory presumption to meet the requirement of due process, not only must there be a rational connection between the fact proved and the fact presumed, but there the inference must be a reasonably probable one and must not be conclusive of the rights of the person against whom it is raised (*Manley* v. *Georgia*, 1929, 279 U. S. 1, 49 S. Ct. 215, 73 L. Ed. 575, and cases cited; *Western & Atlantic R. R.* v. *Henderson et al.*, 1929, 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884).

In the case of *Manley* v. *Georgia*, *supra*, the Supreme Court of the United States held invalid a statute of Georgia which declared that "every insolvency of a bank shall be deemed fraudulent," but which also included a proviso that

a defendant officer of the bank "may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered."

> "Inference of crime and guilt may not reasonably be drawn from mere inability to pay demand deposits and other debts as they mature."

Morrison v. *California*, 1934, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664;
Heiner v. *Donnan*, 1932, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772;
Bailey v. *Alabama*, 1911, 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191;
Tot v. *United States*, 1943, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519;
See Brosman, *The Statutory Presumption*, 1930, 5 Tulane Law Review 17;
Ferry v. *Ramsey*, 1928, 277 U. S. 88, 48 S. Ct. 443, 72 L. Ed. 796;
Atlantic Coast Line R. Co. v. *Ford*, 1933, 287 U. S. 502, 53 S. Ct. 249, 77 L. Ed. 457.

In *Western & Atlantic R. R.* v. *Henderson et al., supra*, the Supreme Court of the United States says:

> "Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property."

On the general subject:

Edmund M. Morgan, "Federal Constitutional Limitations Upon Presumptions Created by State Legislation," Harvard Legal Essays, 1934, p. 323.

In the same case, in *Western & Atlantic R. R.* v. *Henderson et al., supra*, the Supreme Court of the United States says:

"Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is aplied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property. Manley v. Georgia, 279 U. S. 1, 49 S. Ct. 215, 73 L. Ed. 575, and cases cited."

In a more limited field:

Joseph P. Chamberlain, "Presumptions as First Aid to the District Attorney," 14 A. B. A. J. 287, 1928. Note, "Statutory Presumptions as Devices to Facilitate the Proof of Crimes," 1928, 28 Col. L. Rev. 489.

6. Choice of law limited by due process.

Although rules governing the choice of law applicable to a particular case comprise that part of the common law known as conflict of laws, the due process clause prevents a state from making an unreasonable choice. *Alaska Packers Association* v. *Industrial Accident Commission of California,* 1935, 294 U. S. 532.

In this case, the court held that the due process clause was not violated when a state applied its own workmen's compensation act in passing on the claim of an employee who was injured elsewhere but hired within the state.

These cases are illustrative of the widening sphere of the due process clauses of our Constitution, how due process

operates as a general limitation on all government activity and how it protects all persons, all property interests, and all personal and political rights and privileges against arbitrary and unreasonable government action. These principles of due process of law clearly show that an arbitrary conviction based upon two inconsistent charges of offenses is inconsistent with procedural and substantive due process of law. Consistent or inconsistent, the trial judges failed to be specific in the conviction of the offense. It is a denial of due process to convict a defendant arbitrarily, to convict a defendant of two inconsistent, conflicting, and self-contradictory offenses; it is arbitrary judicial procedure to convict a defendant of two offenses both of which cannot be true at the same time—merely by arbitrarily rendering a general verdict under Section 437 of the Code of Criminal Procedure—a verdict which is left to conjecture.

In discussing court procedure and jurisdiction, in the case of *Brown et al.* v. *State of Mississippi*, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682, Mr. Chief Justice Hughes says:

> "That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore v. Dempsey, supra. We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient."

The Supreme Court of the United States in this case ruled that failure to move for exclusion of the confessions, even though required by state practice, by judicial rule, did not bar relief when procedural limitations flowing from the due process clauses of the Fourteenth Amendment were in question or have been violated or transgressed.

"That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore v. Dempsey, supra. We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient."

Brown et al. v. *State of Mississippi*, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682.

The essential elements of which due process is composed have been here analyzed in full and the cases in point establishing them have been here cited for the sole purpose of demonstrating the full force and effect, the latitude, of the due process clauses of the 14th Amendment and its effect upon judicial conduct in the trial of a case and how if one or more elements are lacking the whole proceeding is vitiated for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner.

7. The petitioner reasserts and reemphasizes the constitutional meaning of the essential elements of due process of law as they have been interpreted in the decisions of cases of the Supreme Court of the United States, the custodian and guardian of our Bill of Rights in the Federal Constitution, the unconstitutionality of the meaning of indefiniteness, uncertainty, conjecture, confusion, and arbi-

trariness in a criminal conviction which is enforced upon the defendant-appellant by reason of a rule of judicial procedure in the state courts—a rule of judicial procedure which is a product of judicial decision, with the force and effect of a state law. The defendant-appellant asks this Court to pass on the constitutionality of a rule of judicial procedure, having the force and effect of law, at the instance of the defendant-appellant who has indescribably suffered and is suffering and is about to suffer further injury through its enforcement against him.

This rule shields the erroneous judgment of conviction, the unfairness, the injustice committed against the petitioner herein in the course of the trial.

The case of *Lanzetta* v. *State of New Jersey, supra,* is an interesting case of uncertainty presented by a New Jersey statute which made it a crime or a criminal offense "to be a member of any gang." N. J. S. A. 2:136-4. Upon an analysis of the various definitions of the word "gang", the Supreme Court of the United States held the statute to be invalid. *Lanzetta* v. *State of New Jersey,* 1939, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888.

And in the case of *Herndon* v. *Lowry,* 1937, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066, the Supreme Court of the United States said that

> "Where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained."

All of the foregoing cases bring out the importance of definiteness and certainty in due process of law, set forth the essential guarantees or the essential elements of the constitutional clause of due process of law—that due proc-

ess of law goes far beyond the necessary requisites of due process of law, such as notice of the nature and cause of the accusation, the right to confrontation (the right to examination and the right to cross-examination), and the right to aid of counsel from beginning to end of the prosecution; that its first essential is certainty, ascertainable language in all pleadings (information or indictment), in all statutes, and in all court procedure; that due process and equal protection are intertwined with procedure and jurisdiction, with equality and certainty, with unregulated discretion, and with application to substantive law; and that the requirement of definiteness in criminal statutes is based on due process of law and applies equally to the state and national governments.

In the language of the Supreme Court of the United States, in the case of *Brown et al.* v. *State of Mississippi*, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682, involving procedure and jurisdiction, we read thus:

> "The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. Mooney v. Holohan, supra."

If one element of due process, certainty, is lacking, is wanting, the entire proceeding is tainted, polluted, blemished, and the conviction and sentence are void for a vitiated procedure and jurisdiction.

The phrase "due process of law" grew in contents. The decisions of the Supreme Court of the United States widened its scope, its sphere, since it had been adopted in 1868. It became a great legal philosophy in the realm of rights of persons accused of crime. In the language of Justice Roberts "This phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights."

It applies to all branches of government. State action, however, is not limited to the exercise of the legislative power; it embraces every possible form through which the official authority of the state may seek expression. A state judge who in his official capacity arbitrarily excludes negroes from the grand and petit jury lists, a state board for the equalization of assessments which uses its power in an unreasonably discriminatory manner, and an administrative officer who enforces an otherwise valid statute in an illegal manner have all been held to deny the due process prescribed by the Constitution of the United States.

In *Ex parte Virginia,* 1880, 100 U. S. 339, there was an indictment of a state judge under federal statute making it criminal to disqualify persons for jury duty on account of race, color or previous condition of servitude; the statute was sustained under power of Congress to enforce the prohibition of the 14th Amendment against the denial of equal protection of the laws.

The case of *Ex parte Virginia,* cited above, shows that the protection of the 14th Amendment extends to all acts done under color of state authority, whether or not they are in fact within the power of the officer by whom they are committed. Thus in *Ex parte Virginia,* the statute under which the judge acted in making up the jury lists made no provision for the exclusion of negroes, and such exclusion was an abuse of power. Nevertheless, this was held to be state action, the court declaring: "whoever by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state."

The Supreme Court of the United States has the federal power of enforcing the amendment. The principal method

for its enforcement is the judicial review by the Supreme Court of the United States of state action alleged to conflict with its provisions.

This rule of judicial procedure—that a defendant must raise objection to the general verdict or conviction at the time of its rendition at the close of the trial—is not a special rule for a particular case, but is the general rule, and for this reason it constitutes a deprivation of due process in the course of a trial in a state court.

This is a case where the application of the rule of the court involves great injury to the person or the petitioner who is questioning the validity of the rule. It is not a case or a situation where the person's legal position would be the same whether or not the rule were enforced against him. It is not a case or a situation where the injury is indirect and remote. The petitioner's interests in life and in society, in the state and in the nation have been injuriously affected by this rule of judicial procedure.

This invalid conviction has arbitrarily invaded the personal liberty of the petitioner contemplated and guaranteed by the Constitution of the United States. He was incarcerated, imprisoned, and stigmatized for life. Liberty denotes not only freedom from bodily restraint, but also the right honorably to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

> *Meyer* v. *Nebraska,* 262 U. S. 390;
> *Allgeyer* v. *Louisiana,* 165 U. S. 578.

Such a rule constitutes a deprivation of due process, for it is not a special rule for a particular case, but a general

rule or law throughout the State of New York. It is a general rule or law as any other rule or law passed by the Legislature of the State of New York which affects every citizen's life, liberty, property and immunities; it is of a general character so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado* v. *California,* 110 U. S. 516.

The principal thing to be considered in this petition is the conflict between an arbitrary rule of judicial procedure, state practice, and an essential element of due process of law—certainty; a rule, a product of judicial decision, and an element of due process, a sacred constitutional rule of the 14th Amendment; and the conclusion to be reached on this point is that " 'The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.' " *Brown* v. *State of Mississippi,* 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682.

8. The judicial power of the Court of Special Sessions could not be delegated to the district attorney or to any person.

In the respondent's brief, the district attorney presents the argument that the trial court intended to convict the defendant of false pretenses under Count 1 of the information. Although there were two separate and distinct offenses, he argues, the trial court ignored one and actually intended to convict the defendant of just one offense, and that is the offense of false pretenses. The court did not say so.

This he could not do. He could not substitute his own personal judgment for the personal judgment of the trial court. He could not guess the offense of which the court

intended to convict. There was no reasonable intendment and the conviction could not receive a reasonable construction. He violated the theory of separation of powers.

Judicial power cannot be delegated to any person. The people have a right to the personal judgment of those who have been made judges, and this right cannot be surrendered. This requirement includes the right and duty of deciding, as well as the duty of writing opinions. The term "personal judgment" must not be confused with "personal opinion." The judge must decide cases according to the law and the facts, and not in accordance with his own opinion and ideas, and however disagreeable that duty may be and no matter how greatly his judgment may differ from that of other high functionaries, he is not at liberty to surrender or waive it. *United States* v. *Dickson,* 15 Pet. 162, 10 L. Ed. 689; *Martin* v. *Hunter,* 1 Wheat. 304, 4 L. Ed. 97; *State* v. *Noble,* 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143.

In the language of Chief Justice Stone, "The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked."

Judicial power is the power of the courts to decide and to pronounce their judgments and to carry them into effect between persons and parties who bring cases before them for decision. It involves not only the power to hear and determine a cause, but also the power and jurisdiction to adjudicate the rights of the parties to the controversy and to render a judgment or decree which will be effectual and binding upon them in respect to their personal and property rights in controversy. The power to hear without the power also to adjudicate the rights of the parties to such proceedings is not the exercise of judicial power.

It is the power which protects the rights and interests of individual citizens and to that end construes and ap-

plies the law. From a popular viewpoint it is the power which the public assumes is vested in the courts and in the judges.

The judicial power is one of the incidents of sovereignty of every state or nation.

Muskrat v. *United States,* 219 U. S. 346, 55 L. Ed. 246;

Goetz v. *Black,* 256 Mich. 564, 240 N. W. 94, 84 A. L. R. 802;

James River Nat. Bank v. *Haas,* —— N. D. ——, 15 N. W. (2d) 442, 154 A. L. R. 1005;

Devine v. *Brunswick-Balke-Collender Co.,* 270 Ill. 504, 110 N. E. 780, Am. Cas. 1917B 887;

Illinois v. *White,* 334 Ill. 465, 166 N. E. 100, 64 A. L. R. 1006;

State v. *Noble,* 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143;

Hoxie v. *New York, N. H. & H. R. Co.,* 82 Conn. 352, 73 Atl. 754, 17 Am. Cas. 324.

Due process does not require provision for an appellate review, even in criminal cases. *McKane* v. *Durston,* 153 U. S. 684. But where an appeal is provided for, and availed of, the proceedings in the appellate court are to be considered in determining the question of due process. *Frank* v. *Mangum,* 237 U. S. 309.

9. The conviction conflicts with the basic, essential elements of due process of law, and deprived the defendant-appellant of the constitutional right to due process in the course of the trial by leaving the conviction to conjecture.

In the case of *People* v. *Cohen,* 1911, 148 App. Div. 205, the Appellate Division of the First Department laid down these principles of law as regards the offenses of false pretenses and common-law larceny. These are, as follows:

1. That the offense of false pretenses and the offense of common-law larceny are separate and distinct offenses, each having legal distinctions of its own which distinguishes one offense from the other;

2. That the evidence required to support one offense is not identical with the evidence required to support the other offense;

3. That a defendant cannot be guilty of both offenses at the same time;

4. That he may be guilty of either one or the other, but not of both at the same time and with respect to the same moneys or property;

5. That the judgment of conviction was reversed upon an objection by the defendant to the judgment of conviction or to the charge.

A partial verdict is a finding as to a part of the charge, as where the jury convict the defendant on one or more counts of the indictment, and acquit him of the residue, or convict him on one part of a divisible count, and acquit him of the residue. We have already, in studying the question of variance, seen when such a verdict as this may be found.

If the verdict expressly states that the defendant is guilty on a certain count, giving its number, or of the crime charged therein, specifying it, and not guilty on the other count or counts, or of the crime or crimes therein charged, there is no difficulty in understanding the verdict, and rendering judgment on it.

But if it fails to show with certainty upon which count or counts, or of which of several offenses included in the charge, it is intended to convict, no judgment can be given. The verdict must in all cases be sufficiently certain to enable the court to see of what offense the jury intend to convict,

or it will be void. If the verdict is sufficiently certain to meet this requirement, it is sufficient to support a judgment, though it is inartificially drawn, or is couched in language that does not strictly follow the words of the charge. The verdict will not be rendered insufficient by the insertion of matter which is immaterial and may be rejected as surplusage.

Gipson v. *State,* 38 Miss. 295;
Carter v. *State,* 20 Wis. 647;
Guenther v. *People,* 24 N. Y. 100;
Harris v. *People,* 64 N. Y. 148;
Day v. *People,* 76 Ill. 380;
Wright v. *People,* 33 Mich. 300;
Page v. *Com.,* 9 Leigh (Va.) 683;
Campbell v. *Reg.,* 1 Cox, Cr. Cas. 269;
State v. *Izard,* 14 Rich. (S. C.) 209;
Com. v. *Lowery,* 149 Mass. 67, 20 N. E. 697;
State v. *West,* 39 Minn. 321, 40 N. W. 249;
Sullivan v. *State,* 44 Wis. 595;
Foster v. *State,* 88 Ala. 182, 7 South. 185;
Bowen v. *State,* 28 Tex. App. 498, 13 S. W. 787.

"We find the defendant not guilty in manner and form as charged in the indictment, but we find her guilty of murder in the second degree," was sustained as a conviction of murder in the second degree. *Freel* v. *State,* 21 Ark. 212. And where the indictment contained several counts, a verdict of guilty "on the first charge" was sustained as a conviction on the first count. *Nabors* v. *State,* 6 Ala. 200. So, where an indictment contained counts for larceny and for embezzlement, a verdict of "guilty of embezzlement" was sustained as a conviction on the count charging embezzlement. *Guenther* v. *People,* 24 N. Y. 100. So where the verdict misnumbered the counts, but there was no doubt of the meaning and no prejudice. *Newman*

v. *People*, 23 Colo. 300, 47 Pac. 278. And see *Gipson* v. *State*, 38 Miss. 295; *Page* v. *Com.*, 9 Leigh (Va.) 683.

10. Where the application or the enforcement of the same rule of law by the Court of Appeals, an otherwise valid rule of law of the State, a product of decisions, is in such manner as to favor certain people and to exclude others, so as practically to make unjust and illegal classifications between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

In the language of Chief Justice Taft, "Our whole system of law is predicated on the general fundamental principle of equality of application of the law."

The petitioner contends that the classification in such a rule of law does not rest upon any reasonable basis, but is essentially arbitrary. The guiding principle of this guaranty is that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. The equal protection clause was aimed at undue favor and individual or class privilege. It sought an equality of treatment of all persons similarly circumstanced.

Minor inequities, erroneous decisions or mere errors of judgment by officials will not be sufficient to support a claim of discrimination. There must be something more. There must be some act which in effect amounts to an intentional violation of the essential principle of constitutional equality. For example, it is not sufficient to show that officers failed to enforce an ordinance against one corporation in the same manner as it was enforced against another.

It is state action alone that is prohibited by the Fourteenth Amendment. It does not extend to action by the federal government nor to individual invasion of individual rights. *Smyth* v. *Ames*, 169 U. S. 466; Civil Rights Cases, 109 U. S. 3. But it is not limited in its operation to legislation alone; it extends to state action of every kind, to

all the agencies and instrumentalities employed in the execution of such legislation. *Ex parte Virginia,* 100 U. S. 339. Therefore, though a law is fair and impartial on its face, yet if it is applied and administered by public authority with an unequal hand, so as to practically sanction unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is within the prohibition of the Fourteenth Amendment. *Yick Wo* v. *Hopkins,* 118 U. S. 356.

In *Yick Wo* v. *Hopkins,* 1886, 118 U. S. 356, there was a municipal ordinance requiring license for carrying on of laundry business in wooden buildings. It was so enforced as to arbitrarily exclude Chinese. It was the same form of statute. It was held to violate equal protection clause when so administered as to discriminate arbitrarily against Chinese as a class.

The cases cited above, *Ex parte Virginia* and *Yick Wo* v. *Hopkins,* show that the protection of the 14th Amendment extends to all acts done under color of state authority, whether or not they are in fact within the power of the officer by whom they are committed. Thus in *Ex parte Virginia,* 1880, 100 U. S. 339, there was an indictment of a state judge under federal statute making it criminal to disqualify persons for jury duty on account of race, color or previous condition of servitude; statute was sustained under power of Congress to enforce the prohibition of the 14th Amendment against the denial of equal protection of the laws. Thus in *Ex parte Virginia,* the statute under which the judge acted in making up the jury lists made no provision for the exclusion of negroes, and such exclusion was an abuse of power. Nevertheless, this was held to be state action, the court declaring: "Whoever by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the

name and for the state, and is clothed with the state's power, his act is that of the state."

In *Matter of Lyons* v. *Goldstein,* 1943, 290 N. Y. 19, a case involving a denial of due process—fraud or misrepresentation—there was a general verdict, and no objection was raised by the defendant to the propriety of the general verdict. Yet, on appeal, in a *coram nobis* proceeding, the general verdict or general conviction was reversed. It was based upon the case of *Smith* v. *O'Grady,* 1941, 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859, where due process was denied by misrepresentation which obtained a plea of guilty without benefit of counsel.

In *People* v. *Richetti,* 1951, 302 N. Y. 290, a case involving a denial of due process—right to be represented by counsel—there was a general verdict, and no objection was raised by the defendant to the propriety of the general verdict. Yet, on appeal, in a *coram nobis* proceeding, the general verdict or general conviction was reversed. It was based upon the case of *Powell* v. *Alabama,* 1932, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527.

In *People* v. *Langan,* 1952, 303 N. Y. 474, a case involving a denial of due process—right to aid of counsel—there was a general verdict, and no objection was raised by the defendant to the propriety of the general verdict at the time of its rendition. Yet, on appeal, in a *coram nobis* proceeding, the general verdict or general conviction was reversed.

In all of the above cases, the Court of Appeals went ahead to consider the general verdict, the general conviction, the failure on the part of the defendant to raise objection to the propriety of a general verdict, the manner in which the general verdict or conviction was obtained or procured, the constitutional right of the defendant at the time of the rendition of the general verdict and ruled that if the defendant had a right to due process then, at the time of the rendition of the general verdict, of which

he had been deprived in the course of the trial, if the defendant had a right to move to vacate then because the general conviction had been obtained through a violation of a constitutional right then, he has that right now and his conviction was reversed by the Court of Appeals.

The petitioner's general conviction was obtained or procured through a violation of a constitutional right to due process of law not otherwise subject to review, not otherwise reached by judicial process, but the Court of Appeals affirmed the denial of the application without opinion. It was obtained without regard to principles of definiteness and certainty, without separating guilt from innocence, without a dividing line between what is lawful and unlawful and left the conviction to conjecture. This important element, guilt, could not have been left to conjecture. It was so uncertain that it admitted of different constructions. There was no reasonable intendment and could not receive a reasonable construction. It violated the first essential of due process of law.

Prayer

Wherefore, for the foregoing reasons, which are developed in more detail in the accompanying brief, it is respectfully submitted that this petition for a writ of certiorari to review the order or decision of the Court of Appeals of the State of New York should be granted; that the order or decision of the Court of Appeals of the State of New York be reversed; and that your petitioner be granted such other and further relief as may be proper.

Morris S. Kitzen
Petitioner in person
120 Bristol Street
Brooklyn 12, New York

New York, N. Y. June 7, 1953.

Supreme Court of the United States

OCTOBER TERM, 1953

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

—against—

MORRIS S. KITZEN,

Petitioner.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI

Statement of the Case

Statement and summary of the case, including the facts, are set forth in the Petition, pages 1 to 5. This is stated in the Petition at pages 1 and 2 under the heading "Summary Statement of Matter Involved."

Opinions Delivered Below

The order denying the petitioner's application for a writ of error *coram nobis* to vacate the judgment of conviction of November 19, 1942, and to vacate the judgment of sentence of December 2, 1942, is dated April 24, 1952, and filed in the office of the Clerk of the Court of Special Sessions, at 100 Center Street, New York County, in the City of New York.

The order of the Appellate Division of the First Judicial Department affirming the said order of the Court of Special Sessions is dated October 21, 1952, and filed in the office of the Clerk of the Appellate Division of the First De-

partment at 25th Street and Madison Avenue, New York County, in the City of New York.

The decree or order of the Court of Appeals of the State of New York affirming the said order of the Appellate Division of the First Department is dated May 22, 1953, and is filed in the office of the Clerk of the Court of Appeals, at the City of Albany, New York.

The final decree sought to be reviewed was rendered by the Court of Appeals of the State of New York, in the City of Albany, and is dated May 22, 1953. It is a final decree rendered by the highest court of the State of New York in which a decision could be had. The highest state court was completely silent on the federal question. The remittitur was filed with the Clerk of the Court of Special Sessions of the City of New York, in the County of New York, in the State of New York.

A motion to reargue the appeal or in the alternative to amend the remittitur for the purpose of including the federal question and passing upon it expressly was made returnable on July 13, 1953, in the Court of Appeals, the highest court in the State, in the City of Albany, but the motion for reargument or amendment was denied, on July 14, 1953.

Grounds for Jurisdiction

This jurisdiction is set forth at pages 5 and 6 *et seq.*, in the preceding petition under the heading "Basis of Jurisdiction." Grounds for jurisdiction have been stated in detail in "Reasons for Allowance of the Writ," Petition, page 29 *et seq.*

They include important questions as to rights to due process of law in matters of procedure and in matters of substance in the course of a trial, in a prosecution for the offense of larceny under Section 1290 of the Penal Law of the State of New York and the outright, arbitrary, capricious and unreasonable denials of the said rights.

The case presents, apparently, for the first time by Petition important questions bearing upon the conflict between a rule of judicial procedure and the most important and most comprehensive provisions of the 14th Amendment to the United States Constitution, known in American constitutional law as the due process clauses of the 14th Amendment. This case involves a conflict between a rule of state practice and the essential features of due process as more fully discussed in this Petition, a case where a state court has decided a federal question of substance not theretofore determined by this Court or has decided it in a way probably not in accord with applicable decisions of this Court. The Court of Appeals has decided an important decision of constitutional law which has not been, but should be, settled by this Court. It has so far departed from the accepted and usual course of judicial proceedings in the nature of *coram nobis* that the departure is tantamount to a denial of the equal protection of the laws within the meaning and purview of the equal protection of the laws of the 14th Amendment.

The case presents, apparently, for the first time by Petition important questions as to the meaning, effect and applicability of the essential elements, the necessary requisites, of due process of law in the trial of a criminal case, as these essential elements or first essential elements of due process have been interpreted, elucidated and widened to go beyond the ordinary, necessary requisites of due process of law by the Supreme Court of the United States, such as

1. The right to be informed of the nature and cause of the accusation;

2. The right to be confronted with witnesses;

3. The right to have compulsory process for obtaining witnesses;

4. The right to have the assistance of counsel; and,

5. The right to be prosecuted fairly.

Due process cannot be deemed to be satisfied by mere notice and hearing. The requirement of due process

> "cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment."
>
> *Mooney* v. *Holohan,* 1935, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406.

Beyond jurisdiction, notice and hearing, there are other requirements of due process of law. These are:

1. Laws which operate arbitrarily or unequally are inconsistent with due process.

2. An ascertainable standard of conduct to which it is possible to conform is an essential element of due process.

3. Presumptions shall not take the place of fact in the judicial determination of issues involving life, liberty, or property.

4. The due process clause prevents a state from making an unreasonable choice in matters involving conflict of laws.

Constitutional and Statutory Provisions Involved

The relevant constitutional provisions and statutes involved are set forth in an appendix attached to this brief.

Specification of Errors to Be Urged

The Court of Appeals of the State of New York erred

1) in holding that a rule of judicial procedure, state practice, in a criminal prosecution, takes precedence over an essential element of due process of law, such as definiteness, certainty, in the language of a conviction, when the history of cases of the Supreme Court of the United States clearly shows that definiteness, certainty, ascertainable language in an indictment or statute is a first essential or a necessary requisite of due process of law, and in ignoring the fact that conjecture vitiates the proceeding and jurisdiction for want of the essential elements of due process of law and that it necessarily offends some fundamental principle of justice, tradition and conscience of our people.

Such a rule of judicial procedure is arbitrary, unreasonable, and capricious, and is repugnant to the necessary requisites or essential elements of due process of law of the Fourteenth Amendment to the Constitution of the United States and must yield to the supremacy of the due process clauses of the supreme law of the land—the Constitution of the United States.

In the language of Justice Roberts, "An amendment, by lawful proposal and ratification, becomes a part of the Constitution."

A Constitution is the fundamental organic law by which a state or nation is governed.

It must give way to the first essential elements which compose our fibres of the due process clauses of the 14th Amendment.

2) in permitting a prosecuting officer, the district attorney, to assume judicial power as though judicial power could be delegated to him by the Constitution and to substitute his personal judgment for the personal judgment of the court, where the personal judgment is supposed to be based upon the law and the facts;

3) in ignoring the equal protection clause of the 14th Amendment which prohibits the States from making unreasonable classifications in establishing their rules of criminal procedure; and,

4) in ignoring the fact that the conviction thus obtained or procured was void for want of the essential elements of due process of law, on the ground of its being repugnant to the essential elements of due process of law, on the ground of its being inconsistent with the essential elements composing due process of law within the meaning of the due process clauses of the 14th Amendment to the United States Constitution; and, further, in ignoring the fact that the conviction thus procured and the sentence thus pronounced were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner.

Preliminary Statement

On May 22, 1953, the Court of Appeals of the State of New York affirmed an order of the Appellate Division of the First Judicial Department entered on October 21, 1952, which unanimously affirmed an order of the Court of Special Sessions of the City of New York, of the County of New York, entered on April 24, 1952, denying the petitioner's motion or application for a writ of error *coram nobis* to vacate a judgment of conviction and a judgment of sentence imposed upon the petitioner in violation of the essential elements of due process of law in that the general verdict or general conviction was obtained or procured through a violation of the essential elements of due process of law in matters of procedure and in matters of substance.

The Court of Appeals sustained the rule of judicial procedure which requires an objection to be raised to the general verdict at the time of its rendition in the trial court. Rules of state practice are above everything else.

The petitioner contends, however, that a rule of judicial procedure, whether a product of judicial decision or of legislative enactment, cannot be arbitrary, but must be reasonable and give way to the essential elements of due process of law when there arises a conflict between a rule of judicial procedure and the essential elements of due process of law and must necessarily seek to safeguard the essential elements of due process of law, to safeguard the individual liberty which due process of law intends. A rule of judicial procedure may be a product of judicial decision or of legislative enactment; whereas due process of law—matters of procedure and substance—stems from the provisions of the Constitution—the supreme law of the land.

ARGUMENT

POINT I

The duty of maintaining constitutional rights of a person on trial for his life, liberty, or property rises above mere rules of procedure, mere rules of judicial procedure, a product of judicial decision or of legislative enactment and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.

In the case of *Brown et al.* v. *State of Mississippi*, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682, Mr. Chief Justice Hughes said:

> "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v. Massachusetts, supra; Rogers v. Peck, 199 U. S. 425, 434, 26 S. Ct. 87, 50 L. Ed. 256. The state may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232; Snyder v. Massachusetts, supra. But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination—where the whole

proceeding is but a mask—without supplying corrective process. Moore v. Dempsey, 261 U. S. 86, 91, 43 S. Ct. 265, 67 L. Ed. 543. The state may not deny to the accused the aid of counsel. Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527. Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' Mooney v. Holohan, 294 U. S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A. L. R. 406. And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' Hebert v. Louisiana, 272, U. S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A. L. R. 1102. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

"2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong

so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore v. Dempsey, supra. We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In Fisher v. State, 145 Miss. 116, 134, 110 So. 361, 365, the court said: 'Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country. . . . The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exists, it will refuse to sanction such violations and will supply the corrective.'

"In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. Mooney v. Holohan, supra. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court

> entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed, and the judgment must be reversed."

A judicial rule of procedure concerning objections to a general verdict which prevents, hinders, impedes, and subdues the essential elements of due process of law is repugnant to the letter and the spirit of the essential elements of due process of law and the supremacy of the Federal Constitution as the supreme law of the land. The essential elements of due process must predominate over a rule of judicial procedure, a product of judicial decision or of legislative enactment. The Constitution, with all its words, phrases, and clauses and with all its implications, must rise over and above and beyond mere rules of judicial procedure, however good, practical, useful and serviceable they might be; and under no circumstances could these rules take precedence over due process of law and deprive an accused of substantial and fundamental rights granted him under the provisions of the Federal Constitution. It is the document we must go by and hold it sacred against tyrannies of arbitrary exercise of the powers of government.

Whether it is the act of the legislature or the act of the judiciary, it falls within the prohibitions of the 14th Amendment.

From these cases, we gather very important principles in American constitutional law. We learn that the due process clauses of the Fourteenth Amendment apply to all rules of judicial procedure, whether they are the product of judicial decision or of legislative enactment; yet the clauses have no application to the procedure followed by the legislature in enacting its laws. Similarly, while due process protects substantive rights against unreasonable

legislative action, it offers no protection against judicial decisions affecting such rights.

From these cases, we further gather that state action, however, is not limited to the exercise of the legislative power; it embraces every possible form through which the official authority of the state may seek expression.

1. A state judge who in his official capacity arbitrarily excludes negroes from the grand and petit jury lists,

2. A state board for the equalization of assessments which uses its power in an unreasonably discriminatory manner, and

3. An administrative officer who enforces an otherwise valid statute in an illegal manner have all been held to deny the due process prescribed by the Constitution of the United States. *Ex parte Virginia,* 1880, 100 U. S. 339; *Raymond* v. *Chicago Union Traction Co.,* 1907, 207 U. S. 20; *Yick Wo* v. *Hopkins,* 1886, 118 U. S. 356.

In *Ex parte Virginia,* 1880, 100 U. S. 339, there was an indictment of a state judge under federal statute making it criminal to disqualify persons for jury duty on account of race, color or previous condition of servitude; the statute was sustained under power of Congress to enforce the prohibition of the 14th Amendment against the denial of equal protection of the laws.

In *Yick Wo* v. *Hopkins,* 1886, 118 U. S. 356, a municipal ordinance requiring license for carrying on of laundry business in wooden buildings so enforced as to arbitrarily exclude Chinese. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal

discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In *Yick Wo* v. *Hopkins,* 1886, 118 U. S. 356, the same form of statute held to violate equal protection clause when so administered as to discriminate arbitrarily against Chinese as a class.

The cases cited above—*Ex Parte Virginia,* 1880, 100 U. S. 339, *Raymond* v. *Chicago Union Traction Co.,* 1907, 207 U. S. 20, and *Yick Wo* v. *Hopkins,* 1886, 118 U. S. 356,—show that the protection of the 14th Amendment extends to all acts done under color of state authority, whether or not they are in fact within the power of the officer by whom they are committed. Thus in *Ex parte Virginia, supra,* the statute under which the judge acted in making up the jury lists made no provision for the exclusion of negroes, and such exclusion was an abuse of power. Nevertheless, this was held to be state action, the court declaring: "Whoever by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state."

POINT II

Judicial power could not be delegated to prosecuting officers who act on behalf of the State, like administrative officers in the execution of its laws, and whose action on behalf of the State may constitute state action within the purview of the Fourteenth Amendment and prosecuting officers could not substitute their personal judgment for the personal judgment of the judges of the trial court. *Mooney* v. *Holohan*, 1935, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406.

The defendant-appellant was charged with two offenses: false pretenses (Count 1) and common-law larceny (Count 2). Under the penal law of the State of New York, the evidence required to support the offense under Count 1 was not identical with the evidence required to support the offense under Count 2. The accused might be guilty of one offense or the other, but he could never be guilty of both offenses at the same time as could be seen by the decision of the case of *People* v. *Cohen*, 1911, 148 App. Div. 205, cited herein.

In the respondent's brief before the Court of Appeals, the district attorney or the prosecuting officer contended that the prosecution charged the accused with the offense of false pretenses and that for accommodation or convenience or emergency added a charge or an offense of common-law larceny against the accused; that the intention on the part of the court was to try the accused for false pretenses and convict him actually, practically, legally of the offense of false pretenses and that the addition or insertion of the charge of common-law larceny did not matter in the information. The interesting contention of the prosecuting officer was that the court intended to find the accused guilty of false pretenses although the court did not say so, and it is not anywhere in the record. This is

mere conjecture. There were two distinct offenses with legal distinctions in larceny, consistent or inconsistent. The evidence in one was not identical with the evidence in the other.

In other words, he is substituting his own personal judgment for the personal judgment of the judges who sat at the trial—for the court. This substitution was wholly unconstitutional.

Judicial power cannot be delegated to any person. The people have a right to the personal judgment of those who have been made judges, and this right cannot be surrendered. This requirement includes the right and duty of deciding, as well as the duty of writing opinions. The term personal judgment must not be confused with personal opinion. The judge must decide cases according to the law and the facts, and not in accordance with his own opinion and ideas, and however disagreeable that duty may be and no matter how greatly his judgment may differ from that of other high functionaries, he is not at liberty to surrender or waive it.

United States v. *Dickson,* 15 Pet. 162, 10 L. Ed. 689;
Martin v. *Hunter,* 1 Wheat. 304, 4 L. Ed. 97;
State v. *Noble,* 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143.

Judicial power is the power of the courts to decide and to pronounce their judgments and to carry them into effect between persons and parties who bring cases before them for decision. It involves not only the power to hear and determine a cause, but also the power and jurisdiction to adjudicate the rights of the parties to the controversy and to render a judgment or decree which will be effectual and binding upon them in respect to their personal and property rights in controversy. The power to hear without the

power also to adjudicate the rights of the parties to such proceedings is not the exercise of judicial power.

It is the power which protects the rights and interests of individual citizens and to that end construes and applies the law. From a popular viewpoint it is the power which the public assumes is vested in the courts and in the judges.

The judicial power is one of the incidents of sovereignty of every state or nation. Judicial power is vested in the courts and not the judges. Judges exercise the power as officers of the courts only, and not in any sense as individuals. "The common law so vested it and the Constitution there continued it," observed Chief Justice Elliott of the Supreme Court of Indiana.

Muskrat v. *United States*, 219 U. S. 346, 55 L. Ed. 246;

Goetz v. *Black*, 256 Mich. 564, 240 N. W. 94, 84 A. L. R. 802;

James River Nat. Bank v. *Haas*, —— N. D. ——, 15 N. W. (2d) 442, 154 A. L. R. 1005;

Devine v. *Brunswick-Balke-Collender Co.*, 270 Ill. 504, 110 N. E. 780, Am. Cas. 1917B 887;

Illinois v. *White*, 334 Ill. 465, 166 N. E. 100, 64 A. L. R. 1006;

State v. *Noble*, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143;

Hoxie v. *New York, N. H. & H. R. Co.*, 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324.

The record shows that the trial court did not specify in any manner the count or counts, or of which of several offenses included in the charge, it was intended to convict; that the court left the conviction to conjecture; and under the laws of the State of New York or under the laws of any State in the United States the rule of law as regards verdicts is clear:

1. that if the verdict fails to show with certainty upon which count or counts, or of which of several offenses included in the charge, it is intended to convict, no judgment can be given; and, 2. that the verdict must in all cases be sufficiently certain to enable the court to see of what offense the jury intend to convict, or it will be void.

Here, in the Court of Appeals, the prosecuting officer knew that the verdict had no reasonable intendment and that it could not receive a reasonable construction. To correct and to justify this uncertainty, he attempted to substitute his own personal judgment for the personal judgment of the court by telling the Court of Appeals that the trial court actually, practically, legally intended to convict the accused of the right offense; that is, the offense of false pretenses, ignoring completely the fact that the court did not in the slightest manner say so, that the court did not dismiss one charge and retain the other, from which we could gather some degree of certainty. To act for the trial court and absorb its function is to have the function of a prosecuting officer and also the function of a legally constituted court, which is contrary to the letter and the spirit of separation of powers of government within the meaning of our American Constitutional system and within the meaning of due process of law of the 14th Amendment to the Constitution of the United States.

Consistent or inconsistent, from the general conviction we could not gather some reasonable intendment on the part of the court and the expression of guilt could not receive a reasonable construction.

The prosecuting officer could not do both—convict and judge according to the facts and the law at the same time and thus assume two departments of government in one department. Due process prohibits such criminal procedure.

In his brief before the Court of Appeals, the district attorney alleges that there were two offenses (false pretenses under Count 1 and common-law larceny under Count 2); that for legal and practical reasons and for reasons of convenience the offense of common-law larceny was added to the offense of false pretenses; that the judges of the court had intended to convict the accused of the offense of false pretenses and that they had actually paid no attention to the charge of the offense of common-law larceny in the information; and further that the judges had intended to find the accused guilty of the offense of false pretenses although they did not so specify in their conviction—general verdict.

This brief or this argument was before the Court of Appeals and it no doubt had some influence upon the mind or the determination of the Court of Appeals. The district attorney acted as if judicial power had been delegated to him by the Court of Special Sessions—a thing the Court of Special Sessions could not do. He certainly could not substitute his own personal judgment for the personal judgment of the trial court. His brief presented to the Court of Appeals an unconstitutional assumption of judicial power—to tell what the trial court had intended or meant, in the absence of more specific language, a conviction of the precise offense. It is legally and constitutionally within the province of the judicial power to announce or render a verdict that will have a reasonable intendment and will admit a reasonable construction, and not within the province of the prosecuting officers to do so. The accused was tried and judged by the same person or power which is violative of the fundamental law of the Federal Constitution—a denial of due process. If the conviction was left to conjecture, definiteness could not be supplied by the prosecuting officer in his brief before the Court of Appeals.

The law on this point is clear. Due process does not

require provision for an appellate review, even in criminal cases. *McKane* v. *Durston,* 153 U. S. 684. But where an appeal is provided for, and availed of, the proceedings in the appellate court are to be considered in determining the question of due process. *Frank* v. *Mangum,* 237 U. S. 309.

The prosecuting officer's brief was before the Court of Appeals and hence was within the consideration of the Court of Appeals.

POINT III

Laws which operate arbitrarily or unequally are inconsistent with due process.

In *Giozza* v. *Tiernan,* 148 U. S. 657, 13 S. Ct. 721, 37 L. Ed. 599, 1893, the Court said: "Due process of law within the meaning of the Amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

The states are limited in their conduct of criminal proceedings by state constitutional provisions which are in general of the same character as those imposed upon the federal government by the federal constitutional provisions. They are further limited in this matter by the requirements of the due process clause of the Fourteenth Amendment that an accused be accorded a fair trial with notice of the charge against him and an adequate opportunity to be heard in defense of it. The equal protection clause of that Amendment prohibits them from making unreasonable classifications in establishing their rules of criminal procedure.

State action, however, is not limited to the exercise of the legislative power; it embraces every possible form through which the official authority of the state may seek expression. A state judge who in his official capacity arbi-

trarily excludes negroes from the grand and petit jury lists, a state board for the equalization of assessments which uses its power in an unreasonably discriminatory manner, and an administrative officer who enforces an otherwise valid statute in an illegal manner, have all been held to deny the due process prescribed by the Constitution of the United States.

The due process and equal protection clauses declare only that no state shall do certain acts; they are therefore in no way limited to the activity of a particular branch of state government, but apply to all forms of state activity.

In *Ex parte Virginia,* 1880, 100 U. S. 339, there was an indictment of a state judge under federal statute making it criminal to disqualify persons for jury duty on account of race, color or previous condition of servitude; the statute was sustained under power of Congress to enforce the prohibition of the 14th Amendment against the denial of equal protection of the laws.

In *Yick Wo* v. *Hopkins,* 1886, 118 U. S. 356, there was a municipal ordinance requiring license for carrying on of laundry business in wooden buildings so enforced as to arbitrarily exclude Chinese. The Court said: "Though the law itself be fair on its face and impartial in appearance yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The cases cited, *Ex parte Virginia,* and *Yick Wo.* v. *Hopkins, supra,* show clearly that the protection of the 14th Amendment extends to all acts done under color of state authority, whether or not they are in fact within the power of the officer by whom they are committed. Thus in *Ex parte Virginia, supra,* the statute under which the judge

acted in making up the jury lists made no provision for the exclusion of negroes, and such exclusion was an abuse of power. Nevertheless, this was held to be state action, the court declaring:

> "Whoever by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state."

The due process clauses apply to all rules of judicial procedure, whether they are the product of judicial decision or of legislative enactment; yet the clauses have no application to the procedure followed by the legislature in enacting its laws. Similarly, while due process protects substantive rights against unreasonable legislative action, it offers no protection against judicial decisions affecting such rights.

The due process clauses and the equal protection clause should be considered together. Sometimes a violation of one is also a violation of the other; but their respective spheres of protection are not coterminous—contiguous or adjacent. The due process clauses tend to secure equality in the law in the sense that they require a minimum of protection for everyone's right to life, liberty and property—a right which neither Congress under the Fifth Amendment nor the states, because of the Fourteenth Amendment, may impair. But the Constitution in the latter clause goes beyond this and embodies the idea of equality before the law in a specific guaranty against state action. The purpose of this explanation is to determine the scope of that guaranty.

See *Truax* v. *Corrigan,* 1921, 257 U. S. 312, invalidating a state law which prohibited the issuance of injunctions in

labor disputes on the ground that allowing equitable relief against one group of tort feasors while denying it against others under similar circumstances is a violation of the equal protection clause.

The distinction between the two constitutional provisions is also brought out by the court's characterization of the plaintiff's argument in *Metropolitan Insurance Co.* v. *Brownell,* 1935, 294 U. S. 580, sustaining a state statute applicable only to foreign insurance companies which voided clauses in insurance policies requiring claimants to sue in less than three years: "Petitioner does not assail the prohibition as within the scope of the legislative power or as itself so arbitrary and unreasonable as to be a denial of due process. It is not argued, nor could it be . . . that the restriction would be unconstitutional if applied equally to both classes of corporations. Discrimination alone is the target of the attack."

In *Yick Wo* v. *Hopkins,* 1886, 118 U. S. 356, the same form of statute held to violate equal protection clause when so administered as to discriminate arbitrarily against Chinese as a class.

In *Plessy* v. *Ferguson,* 1896, 163 U. S. 537, state statute providing that railroads should provide separate accommodations for white and colored persons sustained since there was no attempt to deprive negroes of rights to transportation, and accommodations for each race were to be equal.

For an interesting example of equality in taxation arrived at through totally different means, see *Colgate* v. *Harvey,* 1935, 296 U. S. 404.

Previously the Court of Appeals of the State of New York considered the general verdicts in several cases—*Matter of Lyons* v. *Goldstein,* 1943, 290 N. Y. 19, *People* v. *Richetti,* 1951, 302 N. Y. 290, and *People* v. *Langan,* 1952, 303 N. Y. 474—and reversed the general verdicts on grounds

of denials of due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

In *Matter of Lyons* v. *Goldstein,* 1943, 290 N. Y. 19, a case involving a denial of due process—fraud or misrepresentation in obtaining the conviction—there was a plea of guilty, there was a general verdict, and no objection was raised by the defendant to the propriety of the general verdict at the time of its rendition. Yet, on appeal in a *coram nobis* proceeding, the general verdict or conviction under a general verdict was reversed. It was based upon the case of *Smith* v. *O'Grady,* 1941, 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859, where due process was denied by misrepresentations which obtained a plea of guilty without benefit of counsel.

In *People* v. *Richetti,* 1951, 302 N. Y. 290, a case involving a denial of due process—right to be represented by counsel—there was a plea of guilty without benefit of counsel, there was a general verdict, and no objection was raised by the defendant to the propriety of the general verdict at the time of its rendition. Yet, on appeal in a *coram nobis* proceeding, the general verdict or conviction under a general verdict was reversed. The reversal was based upon the case of *Powell* v. *Alabama,* 1932, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527.

In *People* v. *Langan,* 1952, 303 N. Y. 474, a case involving a denial of due process—right to counsel—there was a plea of guilty without benefit of counsel, there was a general verdict, and no objection was raised by the defendant to the propriety of the general verdict at the time of its rendition. Yet, on appeal in a *coram nobis* proceeding, the general verdict or conviction under a general verdict was reversed. The reversal was based upon the principle of the right to be represented by counsel elucidated in the case of *People* v. *Richetti, supra.*

In *Matter of Lyons* v. *Goldstein,* 1943, 290 N. Y. 19, *People* v. *Richetti,* 1951, 302 N. Y. 290, and in *People* v.

Langan, 1952, 303 N. Y. 474, the Court of Appeals went ahead to consider the general verdict, the failure on the part of the defendant to raise objection to the propriety of a general verdict, the manner in which the general verdict or conviction under the general verdict was obtained or procured, the constitutional right of the defendant at the time of the rendition of the general verdict, and ruled that if the defendant had a right then, a constitutional right to due process of law of which he had been deprived in the course of the trial, he has that right now and has a right now to move to vacate the judgment of conviction. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner.

The cases cited above were reversed for want of an essential element of due process. The appellant's case was not reversed, though it violated an essential element of due process—certainty, definiteness, ascertainable language, though the conviction and sentence were void for want of the essential elements which compose the constitutional meaning of due process and though the entire proceeding was thus vitiated for lack of the first essential of due process—certainty.

The appellant's contention is that he was denied the equal protection clause of the 14th Amendment. The equal protection clause of this Amendment prohibits the states from making unreasonable classifications in establishing their rules of criminal procedure. Other cases were reversed for want of the essential elements of due process; the appellant's case was not reversed for want of the essential elements of due process—for want of the first essential of due process—although the conviction was left to conjecture, the offenses consistent or inconsistent, and the evidence in both offenses was not identical and could not be identical.

The equal protection clause means that "equal protection and security shall be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than is prescribed to all for like offenses." *Barbier* v. *Connolly*, 1885, 113 U. S. 27.

In the case of *Yick Wo.* v. *Hopkins*, 1886, 118 U. S. 356, the same form of statute held to violate equal protection clause when so administered as to discriminate arbitrarily against Chinese as a class.

The clause creates no new rights, but operates on rights already in existence. It should be noted that the clause does not guarantee identical rights; the provision is satisfied if substantially similar rights and privileges are given to all persons similarly situated. *Plessy* v. *Ferguson*, 1896, 163 U. S. 537.

In the case of *Plessy* v. *Ferguson, supra*, the state statute providing that railroads should provide separate accommodations for white and colored persons was sustained since there was no attempt to deprive negroes of right to transportation, and accommodations for each race were to be equal.

The due process and equal protection clauses declare only that no state shall do certain acts; they are therefore in no way limited to the activity of a particular branch of state government, but apply to all forms of state activity.

The due process clauses and the equal protection clause should be considered together. Sometimes a violation of one is also a violation of the other; but their respective spheres of protection are not coterminous. The due process clauses tend to secure equality in the law in the sense that they require a minimum of protection for everyone's right to life, liberty, and property—a right which neither Congress under the Fifth Amendment nor the states, because of the Fourteenth Amendment, may impair. But the Constitution in the latter clause goes beyond this and embodies the idea of equality before the law in a specific guaranty against state action. Discrimination alone is the target of the attack.

"As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance. See, for example, *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266; *Smith* v. *Cahoon*, 283 U. S. 553. In the latter case a motor vehicle regulation was struck down upon citation of many authorities because 'such a classification is not based on anything having relation to the purpose for which it is made.' 283 U. S. 553, 567. If that were the situation here, I should think we should reach a similar conclusion." *Railway Express Agency, Inc. et al.* v. *New York*, 336 U. S. 106.

The same form of rule of judicial procedure violated the equal protection clause when so administered as to arbitrarily exclude the defendant-appellant. The decision

by the Court of Appeals so far as it relates to the appellant's case was arbitrary, capricious and unreasonable, and was a violation of the equal protection of the laws.

POINT IV

A conviction which was obtained through a violation of the defendant-appellant's right to the essential elements of due process of law in the course of the trial within the meaning of the due process clauses of the Fourteenth Amendment is inconsistent with the necessary requisites of due process of law and is unconstitutional.

In this case the conviction was left to conjecture, doubt, guesswork. It had no reasonable intendment and could not receive a reasonable construction. The defendant-appellant might have been found guilty of one offense or the other. It lacked definiteness, certainty, ascertainable language, and was therefore a violation of the first essential of the necessary requisites of due process of law within the meaning of the decisions of cases by this Court. In spite of this conjectural conviction, the trial court pronounced sentence.

This vitiated procedure and jurisdiction, and the imposition of a sentence by a trial court beyond its jurisdiction was void.

> "The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. *Mooney* v. *Holohan, supra.*"
>
> *Brown et al.* v. *State of Mississippi*, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682.

CONCLUSION

The Court of Appeals decision or order affirming the order of the Appellate Division of the first judicial department is in conflict with applicable decisions of this Court, attributes unwarranted discriminatory intent to the rule of judicial procedure, involves questions of due process and equal protection of the law of the greatest importance to all persons, aliens as well as citizens, upon which the Court of Appeals clearly erred; its affirmance of the order is contrary to the essential elements of due process of law as elucidated in the decisions of this Court and is in conflict with decisions of other Courts—Federal and State; and a writ of certiorari should be granted and the case should be reviewed and reversed by this Court.

Respectfully submitted,

MORRIS S. KITZEN,
Petitioner in person,
120 Bristol Street,
Brooklyn 12, New York.

APPENDIX

U. S. Constitution—Article XIV, Section I.

Penal Law of the State of New York—Section 1290, What It Includes.

Judicial Decisions Governing Objection to General Verdict in State Courts.

28 U. S. Code, Annotated, Section 1257, Subdivision 3.

Penal Law of the State of New York—Section 1290, Prior to Amendment of Penal Law which became effective September 1, 1942 (Chapter 732, Laws of 1942).

Relevant Constitutional and Statutory Provisions and Decisions

The relevant constitutional provisions of the United States Constitution are in Article XIV, Section I.

> Article XIV, Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant statutory provisions are as follows:

> Penal Law of the State of New York, Section 1290, which includes the offenses of larceny, embezzlement, and false pretenses.

The relevant judicial decisions are those relating to Objection to General Verdict:

> Where the indictment charged, in separate counts, larceny in common-law form and larceny as bailee, accused could not, for the first time on appeal, complain of the general verdict. (*People* v. *Cummins,* 1912, 153 App. Div. 93, 138 N. Y. S. 517, 28 N. Y. Cr. R. 380, affirmed, 1913, 209 N. Y. 283, 103 N. E. 169, 30 N. Y. Cr. R. 330.)
>
> Where objection that was taken by the prisoner on trial was to the sufficiency of the indictment, and did not raise the question of mode of trial thereunder, or of election of counts, the question of propriety of rendition of general verdict cannot be raised for first time on appeal (*People* v. *Dunn,* 1882, 90 N. Y. 104, reversing *Dunn* v. *People,* 27 Hun 272).

Also the decisions of the following cases upholding the rule of objection to the propriety of the general verdict at the time of its rendition at the trial: *People* v. *Louis Sciascia,* 1944, 268 App. Div. 14; *People* v. *Louis Sciascia,* 1945, 294 N. Y. 927.

Jurisdiction of this Court is invoked under 28 U. S. Code, Annotated, Section 1257, Subdivision 3.

PENAL LAW OF THE STATE OF NEW YORK SECTION 1290.
LARCENY DEFINED.

A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

> 1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation

or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof,

Steals such property, and is guilty of larceny.

Office - Supreme Court, U
FILED
SEP 12 1953
HAROLD B. WILLEY, Cl

Supreme Court of the United States

October Term, 1953

No. 260

MORRIS KITZEN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. HOGAN
District Attorney
New York County

RICHARD G. DENZER
CHARLES W. MANNING
STUART G. SCHWARTZ
Assistant District Attorneys
Of Counsel

INDEX

	PAGE
PROCEEDINGS BELOW	1
NATURE OF THE PROSECUTION	2
QUESTIONS PRESENTED AND THE RESPONDENT'S POSITION	3
ARGUMENT—No Substantial Question is Presented	4
CONCLUSION	5

Cases

Fox Film Corp. v. Muller, 296 U. S. 207	4
Herb v. Pitcairn, 324 U. S. 117	4
Matter of Hogan v. Court of General Sessions (1946) 296 N. Y. 1	3
Murdock v. Memphis, 20 Wall. 590	4
Paterno v. Lyons, 334 U. S. 314	5
People ex rel. Harrison v. Jackson (1948) 298 N. Y. 219	3
People v. Lobel (1948) 298 N. Y. 243	3
People v. Noblett (1927) 244 N. Y. 355	3
People v. Sadness (1949) 300 N. Y. 69	3

Statutes

New York Penal Law (1941): Section 1290	3

Supreme Court of the United States

October Term, 1953

No. 260

MORRIS KITZEN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Proceedings Below

On December 2, 1942, the petitioner was convicted in the Court of Special Sessions of the City of New York of the crime of Petit Larceny and sentenced to prison for a term of one year. That judgment was affirmed on appeal by the Appellate Division of the New York Supreme Court [267 App. Div. 760].

In 1952, some years after expiration of the sentence, the petitioner moved the Court of Special Sessions for a writ of error *coram nobis* to vacate the conviction. The motion was denied, and that decision was affirmed by the Appellate Division [280 App. Div. 923], and by the Court of Appeals

[305 N. Y. 756]. An application by the defendant in the Court of Appeals for leave to reargue, or, in the alternative, for an order amending the remittitur from that court to certify that questions under the United States Constitution had been passed upon, was denied [N. Y. L. J., July 16, 1953, p. 91, col. 4].

The instant petition seeks a writ of certiorari directed to the Court of Appeals to review the determination of the *coram nobis* proceeding.

Nature of the Prosecution

The defendant, a lawyer, was charged with Petit Larceny and Attempted Petit Larceny in that on three occasions he had sought to obtain money from an insurance company through false representations that an accident had occurred resulting in injury to one of his clients (20-5).* The charges were set forth in a six-count information, each transaction being described in two counts, one alleging the crime in common law form and one alleging specifically that it had been accomplished through the use of false representations (20-5). At the trial, four of the counts were dismissed at the end of the People's case, leaving two counts which referred to one of the transactions (299). At the conclusion of the trial, the court rendered a general verdict of "guilty" with respect to those two counts (428-9).

---

* Unless otherwise indicated, references are to folios of the printed record on appeal from the judgment of conviction.

Questions Presented and the Respondent's Position

The principal basis of the *coram nobis* application was a contention that the trial court erred in rendering a general verdict. Specifically, the petitioner contended that, since each of the two counts of conviction involved the same transaction—one charging larceny by false pretenses, in which title to the stolen property necessarily passes, and the other charging common law larceny, in which title to the stolen property does not pass [see N. Y. Penal Law (1941) §1290; *People* v. *Lobel* (1948) 298 N. Y. 243; *People* v. *Noblett* (1927) 244 N. Y. 355]—the general verdict of "guilty" was excessively vague.

Opposing the application for *coram nobis,* the respondent pointed out that any objection to the form of the verdict, if taken at the time of conviction, could have been raised on appeal, and that, under New York law, the availability of such procedures at the time of conviction and appeal precluded later resort to the writ of error *coram nobis* [*People* v. *Sadness* (1949) 300 N. Y. 69, 74; *People ex rel. Harrison* v. *Jackson* (1948) 298 N. Y. 219, 225 (concurring opinion); *Matter of Hogan* v. *Court of General Sessions* (1946) 296 N. Y. 1, 6]. In addition, the respondent opposed the application on the merits, taking the position that, in any event, the rendition of a general verdict in this case was proper.

ARGUMENT

No Substantial Question is Presented

This Court has consistently adhered to the principle that it will not review judgments of state courts that rest upon adequate and independent non-federal grounds [*e.g.*, *Herb* v. *Pitcairn*, 324 U. S. 117, 125; *Fox Film Corp.* v. *Muller*, 296 U. S. 207; *Murdock* v. *Memphis*, 20 Wall. 590, 636]. That principle is applicable here.

In the present case, as already noted, the New York Court of Appeals refused to amend its remittitur to certify that questions under the United States Constitution had been considered. Since respondent resisted the appeal below on state procedural grounds as well as on the merits, and since motions to amend the remittitur in the fashion requested by the petitioner are a recognized part of New York practice, the Court of Appeals' denial of the petitioner's motion establishes that that court's affirmance did not constitute an adjudication of a question of federal constitutional law, but rested upon non-federal grounds.

Accordingly, the only constitutional contention open to the petitioner at this point is his argument that the rule of New York procedural law regarding the availability of *coram nobis* is so harsh that its application here constitutes a deprivation of liberty or property without due process (Def's Point I, pp. 66-71).* With

* While this contention was not one of the clearly defined issues in the Court of Appeals—as is evidenced by the denial of the motion to amend the remittitur—certain portions of the petitioner's brief below, if construed most liberally, may be interpreted as having been intended to raise the question (App's Brief, Point IV, pp. 22-9).

respect to this contention, we point out that, entirely apart from the patent reasonableness of the rule as an aid to the orderly administration of justice—it has already been at least once approved by this Court [*Paterno* v. *Lyons*, 334 U. S. 314, 319]—certainly no unconstitutional deprivation of liberty or property has resulted from the rule's application to the present case, where the judgment attacked is more than ten years old, where the sentence has long since expired, and where ample previous opportunities to present his grievances have been neglected by the petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

RICHARD G. DENZER
CHARLES W. MANNING
STUART G. SCHWARTZ
Assistant District Attorneys
Of Counsel

September, 1953

SEP 18 1953
HAROLD B. WILLEY, Cl

Supreme Court of the United States

OCTOBER TERM, 1953

No. 260

MORRIS KITZEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

APPELLANT'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MORRIS S. KITZEN
Petitioner in Person
120 Bristol Street
Brooklyn 12, New York

INDEX

PAGE

Proceedings Below 1

Nature of the Prosecution 2

Questions Presented and the Respondent's Position 3

ARGUMENT:

A substantial question is presented 4

CONCLUSION 7

TABLE OF CASES:

Brown v. Massachusetts, 144 U. S. 573, 580 4

Brown et al. v. State of Mississippi, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682 3

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 231-2 4

Dunn v. People, 27 Hun. 272 2

Erie R. Co. v. Purdy, 185 U. S. 148 4

Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969 4

Guenther v. People, 24 N. Y. 100 6

Hawk (Ex Parte), 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572 4

Hulbert v. Chicago, 202 U. S. 275 4

PAGE

Lyons (Matter of) v. Goldstein, 1943, 290 N. Y. 19 5

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 309 .. 5

Pennsylvania R. Co. v. Illinois Brick Co., 297 U. S. 447, 462-3 4
People v. Cummins, 1912, 153 App. Div. 93, 138 N. Y. S. 517, 28 N. Y. Cr. R. 380, affirmed, 1913, 209 N. Y. 283, 103 N. E. 169, 30 N. Y. Cr. R. 330 2
People v. Dunn, 1882, 90 N. Y. 104, reversing Dunn v. People, 27 Hun. 272 2
People v. Langan, 1952, 303 N. Y. 474 5
People v. Richetti, 1951, 302 N. Y. 290 5
People v. Sciascia, 1944, 268 App. Div. 14 2
People v. Sciascia, 1945, 294 N. Y. 927 2

Rogers v. Alabama, 192 U. S. 226, 230-1 5

Supreme Court of the United States

OCTOBER TERM, 1953

No. 260

MORRIS KITZEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

APPELLANT'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Proceedings Below

On November 19, 1942, the defendant-appellant was convicted under a general verdict on two distinct offenses —where the evidence under Count 1, false pretenses, was not identical with the evidence under Count 2, common-law larceny by trespass and asportation, where the accused, if there had been sufficient evidence, might have been guilty of one offense or the other but could never have been guilty of both offenses at the same time, and where the conviction under the general verdict was left to conjecture, guesswork, and the definiteness or certainty of the count or counts, offense or offenses, crime or crimes included in the charge could not be supplied long afterwards by the district attorney or anyone else. This important element—certainty

—cannot and could not have been left to conjecture, for it is of the very essence of the law of conviction itself. Without it, the conviction is too indefinite and uncertain and rests upon an uncertain foundation and it is clearly violative of the first essential element of due process of law.

Nature of the Prosecution

The district attorney says, if an objection as to the federal question, had been taken at the time of conviction, the accused could have raised the unconstitutionality of the conviction on appeal to the appellate courts of the State of New York. He contradicts himself when he says that the accused had a right of appeal. The accused was denied a right of appeal by the State.

Under the decisions of the cases by the appellate courts, the accused was barred by the rules of law, was precluded from raising the federal question on appeal in any appellate court. His right to appeal was lost, was extinguished, was lost forever under the following decisions:

People v. *Cummins,* 1912, 153 App. Div. 93, 138 N. Y. S. 517, 28 N. Y. Cr. R. 380, affirmed, 1913, 209 N. Y. 283, 103 N. E. 169, 30 N. Y. Cr. R. 330;

People v. *Dunn,* 1882, 90 N. Y. 104, reversing *Dunn* v. *People,* 27 Hun. 272;

People v. *Sciascia,* 1944, 268 App. Div. 14;

People v. *Sciascia,* 1945, 294 N. Y. 927.

Questions Presented and the Respondent's Position

He does not disclose before this Court the real rule of judicial procedure in criminal prosecutions; that this rule of judicial procedure is a product of judicial decision by the appellate courts of the State of New York and bars an appeal by the accused and that the accused must resort to an application in the nature of a writ of error *coram nobis* to vacate the judgment of conviction.

In his petition and in his brief, the petitioner raises the element of certainty—an essential element composing due process, a right within the meaning of the due process clauses of the 14th Amendment—a federal question under the Constitution.

In the respondent's brief, the district attorney mentions a beautiful phrase from the rules—that there is an adequate and independent non-federal ground—without specifying it before the Court, without telling the Court what it is, where it is, where is the adequacy and where is the independence of the non-federal ground. He wants the Court to look for it, hunt for it, for that actual, practical non-federal ground. This is done with a view to confusing the grounds—to defeat the petitioner's right specially set up and claimed under the Constitution. He fails to point out to the Court in specific language just what is that adequate and independent non-federal ground so that everybody may see it. Paraphrasing the standards set out in the Rules is not enough to show that there is a non-federal ground. Allegations, without facts, mean nothing.

The State may not permit an accused to be denied the essential elements of due process of law without supplying corrective process (*Brown et al v. State of Mississippi*, 1936, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682).

ARGUMENT

A substantial question is presented.

The district attorney further fails to disclose before this Court just what this Court has said about the place where and the time when the federal question could be raised. True, it must be presented to the trial court at the point considered appropriate under state procedure. Under the following cases, this Court has laid down the rules of law concerning the place where and the time when the federal question should be or could be raised, thus:

> *Hulbert* v. *Chicago,* 202 U. S. 275 (complete failure to raise question at trial court level);
> *Brown* v. *Massachusetts,* 144 U. S. 573, 580 (failure to raise question before verdict held to be fatal);
> *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 231-2 (proper to raise question in motion for new trial).

It is proper to raise the federal question upon a motion for a new trial (*Frank* v. *Mangum,* 1915, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969). It is proper to raise the federal question in the common law writ of error *coram nobis,* which may be issued by the trial court as a remedy for infringement of constitutional right of the defendant in the course of the trial (*Ex Parte Hawk,* 1944, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572).

If this is not done, the Supreme Court will decline to exercise jurisdiction both where the highest state court expressly refuses to decide the federal question for this procedural reason (*Pennsylvania R. Co.* v. *Illinois Brick Co.,* 297 U. S. 447, 462-3; *Erie R. Co.* v. *Purdy,* 185 U. S. 148)

and where the highest state court is completely silent on the federal question (*Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 309). In the latter instance, the Court assumes, unless it can affirmatively be shown otherwise, that the silence is due to the procedural deficiency. But the Court itself has the power to examine into the raising of the federal question and if it is convinced that the highest state court's refusal to deal with that question is a mere evasion the Court's jurisdiction can be asserted (*Rogers* v. *Alabama,* 192 U. S. 226, 230-1).

He further fails to disclose to this Court that the Court of Appeals of the State of New York has, since 1943, reversed many old cases that have been brought before it on application by defendant-appellant in the nature of a writ of error *coram nobis* to vacate a judgment procured or obtained through a violation of a constitutional right to due process of law.

In the case of *Matter of Lyons* v. *Goldstein,* 1943, 290 N. Y. 19, the Court of Appeals reversed the conviction of 1936. In *People* v. *Richetti,* 1951, 302 N. Y. 290, the Court of Appeals reversed a conviction of 1922. In *People* v. *Langan,* 1952, 303 N. Y. 474, the Court of Appeals reversed a conviction of 1930.

Where the accused had no right of appeal, where for any other reason an appeal would not furnish a remedy, where an appeal to a higher court for error at the trial and appearing in the record was not available, where a motion to vacate the judgment and for a new trial for defect not appearing on the record was not available, he could avail himself of the common law writ of error *coram nobis* recognized and employed in the State of New York; and until that remedy has been sought without avail we cannot say that petitioner's state remedies have been exhausted (*Ex Parte Hawk, supra*).

Although there is indefiniteness, uncertainty, although the conviction is void for uncertainty, although it violates the first essential element of due process of law according to the decision in the case of *Guenther* v. *People*, 1861, 24 N. Y. 100, and according to the decisions of cases by this Court cited in the Petition and in the Brief, although there is a conflict with another appellate court—a conflict between a decision of the highest state court and that of the Supreme Court on matters of federal law (an important element of due process of law) and there is an important question of substance, an actual, practical effect of a disputed decision, and its consequences for other litigants and in other situations, and that the question involved be decided finally by the Supreme Court, not just because the decision below is or may be erroneous, the district attorney seeks herein to deny to the accused:

1) the right of appeal to a higher court for error at the trial and appearing in the record;

2) a motion to vacate the judgment and for a new trial for defect not appearing on the record; or

3) where for any other reason an appeal would not furnish a remedy.

He closes all doors to the accused and shuts all proceedings that are open to an accused in this State. Where the accused had no right of appeal, and the conviction procured through a violation of a constitutional right to due process of law cannot otherwise be reached by judicial review or is not otherwise subject to judicial review, he has a right to make an application for a writ of error *coram nobis*—a corrective process supplied by the State of New York

since 1943 and he has a right to raise the federal question in such application or motion to vacate and set aside the judgment of conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS S. KITTEN
Petitioner in Person
120 Bristol Street
Brooklyn 12, New York